93-648

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

COUNTY OF MURRAY, GEORGIA, BILL HANSIRD AS FORMER SHERIFF OF MURRAY COUNTY, MONTE CHASTAIN AND ROBERT BISHOP,

Petitioners,

against

JOHNNY VINEYARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Did the district court deny petitioners their fundamental right to a fair trial when, during the closing argument in an excessive force civil rights trial, counsel for the respondent argued, despite contrary admonition by the court, that the notorious videotaped Rodney King beating incident "brought police brutality to the forefront of the news" and that the jury should "send a message to the politicians" that police brutality will not be tolerated?

II. LIST OF ALL PARTIES

The caption contains the names of all parties to the proceeding, which are as follows:

Johnny Vineyard

County of Murray, Georgia

Bill Hansird

Monte Chastain

Robert Bishop

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V. OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit was reported as follows:

> *Johnny Vineyard, Plaintiff-Appellee v. County of Murray, Georgia, Bill Hansird, as former Sheriff of Murray County, Monte Chastain, Robert Bishop, Defendants-Appellants,* 990 F.2d 1207 (11th Cir. 1993).

The Petition for Rehearing was denied on July 28, 1993. The District Court rendered an Order denying Petitioners' Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Motion to Amend Judgment and for Remittitur from a jury verdict rendered on January 29, 1992 in favor of Plaintiff and against Defendants in the amount of $195,000.00

VI. JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on May 17, 1993 (one judge dissenting). Petitioners filed their Suggestion for Rehearing En Banc on June 7, 1993, in the court below, which Petition for Rehearing was denied on July 28, 1993. This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C. § 1254(1).

VII. PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE.

The relevant constitutional provisions involved are:

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The relevant statutes involved are:

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

VIII. STATEMENT OF THE CASE

The Eleventh Circuit decision in this case and the events described therein will directly impact every federal court in the United States. This 42 U.S.C. § 1983 case comes to this Court after a jury verdict of $195,000 against the defendants. (App. pp. 29a-30a). The jury awarded this excessive amount because of the improper remarks made during the closing argument by counsel for Plaintiff.

The case was tried before a jury on January 21, 23, 24, 27 and 28, 1992. Prior to the trial of the case, Petitioners filed a Motion in Limine to prohibit, *inter alia*, "comment upon, or reference to, directly or indirectly, to 'send a message' to police agencies or other officers." The trial court reserved ruling in part, and granted the motion in part. (App. pp. 43a-44a, 50a-51a). However, the trial court made it clear that counsel should make no reference to other cases, trials or verdicts. (App. pp. 50a-51a).

In complete disregard of the numerous rulings from the trial court about making reference to other cases and trials, counsel for Respondent unabashedly began his closing argument by arguing that if anything good or

positive came out of the horrible Rodney King beating, it was that police brutality was brought to the forefront of the news. Counsel for Petitioners immediately objected and before being able to set forth any specific grounds, the court sustained the objection and, in spite of the direct contravention of the court's previous preventive order, gave only an insufficient "*mild curative*" instruction. App. p. 21a; *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1214 (11th Cir. 1993) (Godbold, *dissenting*).

Counsel for Respondent began his closing argument by discussing the Rodney King incident, as follows:

> MR. DEAN (Counsel for Plaintiff): If there is anything good or positive that came out of the horrible Rodney King beating that most of you witnessed on television, is that the issue of police brutality was brought to the forefront of the news across the country and it gave a lot of people the opportunity to realize that police brutality does occur.
>
> MR. DAVIS (Counsel for Defendants): Excuse, me, Your Honor I'm going to object at this point.
>
> THE COURT: I'll sustain your objection.
>
> MR. DAVIS: This has nothing to do –
>
> THE COURT: What happened in California, and even though he didn't mention it was California, that's where it happened, really doesn't have anything to do with this case. This case has to be tried upon the evidence in this case. So go ahead.
>
> MR. DEAN: Well, there was no videotape in this case and you, the jury, have been given the task of listening to all the evidence. . . .

App. pp. 19a-20a, 54a.

Later, after the Rodney King and videotape remarks, counsel for Respondent began to argue that the jury should "send a message" to "the politicians there [Murray County], the sheriff that's in office there, and the deputies that are involved there. . . . You'll tell the politicians there." (App. p. 66a). The "send a message" argument was repeated, and counsel for Petitioners objected and requested to approach the Bench. A motion for mistrial was made on the basis that the cumulative effect of the argument had greatly prejudiced the defendants, denying them a fair trial. The motion was denied and additional purported curative instructions were given. (App. pp. 66a-67a).

Thereafter, a jury returned a verdict in favor of the Plaintiff against Murray County, Georgia, Bill Hansird in his Official Capacity as former Sheriff of Murray County, Monte Chastain and Robert Bishop, in the amount of $115,000.00 compensatory damages, and against Defendant Robert Bishop in the amount of $60,000.00 punitive damages, and against Defendant Monte Chastain in the amount of $20,000.00 punitive damages. (App. pp. 29a-30a).

On May 17, 1993, the Eleventh Circuit Court of Appeals affirmed the judgment and denial of Defendants' Motion for Judgment Notwithstanding the Verdict, with Senior Circuit Judge Godbold[1] issuing a dissenting opinion.

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[1] Senior Circuit Judge Godbold is the former Chief Judge of the United States Court of Appeals, Eleventh Circuit.

IX. REASON FOR GRANTING THE WRIT

A. The Eleventh Circuit decision conflicts with other circuits and guidance is needed to address notorious emotional events and their impact on the fairness of a trial.

This case presents an important issue which faces every federal court that tries an excessive force claim under 42 U.S.C. § 1983: to what extent may parties and their lawyers import the Rodney King incident[2] and other similar notorious events into a trial, civil or criminal, when such events have no materiality to, and only prejudice, the facts of the case. "Few matters in modern times have rubbed raw the emotions of individual citizens, and of American institutions, as have the Rodney King events." *Vineyard v. County of*

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[2] Although certainly not necessary, the Court is reminded that the Rodney King incident occurred on March 3, 1991, when the Los Angeles, California Police Department and its officers, stopped King, and as evidenced by an amateur video tape recording, he was severely beaten by numerous police officers. The incident swept across the country in national news; it was the subject of repeated magazine articles, newspaper articles, television news programs and other media. During the very trial of this case at bar, CBS advertised a program entitled "Cops on Trial" – 48 Hours to be aired on January 29, 1992, which was a day after this trial concluded. However, numerous promotionals were shown during the course of this trial. The aftermath of the not guilty verdicts of the police officers in the March 4, 1992 – April 29, 1992 criminal trial shows the impact of this incident on society. "Los Angeles suffered two days of rioting resulting in 58 dead, 4,000 injured, 12,000 arrested, and $1 billion of damage. . . . Less severe rioting occurred in . . . - Atlanta. . . . " *Vineyard*, at 1215, n. 1, Godbold, *dissenting*. Now "two officers have been convicted on federal criminal charges." *Id.*

Murray, Ga., 990 F.2d 1207, 1214 (11th Cir. 1993) (Godbold, *dissenting*) [hereinafter referred to as "*Vineyard*, Godbold dissent, p. ___"]. This is a matter which "swept across our country like a prairie fire, arousing cries of outrage from television and radio commentators and the print media, from public officials at all levels, and from pulpits across the country." *Vineyard*, Godbold dissent, p. 1214. Petitioners submit that this question is one that must be addressed by this Court; otherwise references similar to these will continue to lead to unfair trials, inconsistent results, racial unrest, societal outrage with jury verdicts and possibly video-crazed lynch mobs.

The Rodney King incident, referred to in the closing argument of counsel for Respondent in this case in the face of careful preventive measures by Petitioners, has spawned numerous appeals throughout the United States. Questions of double jeopardy, peremptory challenges, prejudicial remarks during closing argument, bail pending appeal, evidence, change of venue, court delays, suspended trials, retaliation, employment discrimination, racially mixed jury panels, juror misconduct, fear of receiving fair-treatment, constitutionality of hate crime statutes, and others have arisen because of the Rodney King incident. More issues are likely to be presented.

The trial in the case at bar occurred in Rome, Georgia, over 3000 miles from Los Angeles and the beating of Rodney King. However, the continuous media coverage of the incident and the subsequent events infected the jury panel in the district court in Rome. Incredibly, "with the first breath of the closing argument to the jury, plaintiff's counsel threw the skunk in the jury box." *Vineyard*, Godbold dissent, p. 1215. Counsel made a deliberate,

outrageous and unprofessional appeal by reference to the beating of Rodney King and police brutality. The jury was clearly affected by such an improper argument.[3] The verdict reflects passion and undue sympathy which unfairly and illegally inflated it. The improbitious conduct by counsel for plaintiff[4] poisoned the jury. The only remedy was a mistrial.

Surprisingly, other unguided or over powering lawyers around this country have resorted to similar improper invectives. In a 42 U.S.C. § 1983 case in Illinois, a jury returned a verdict in favor of Pamela Greenwood, who brought an action against police officers for an illegal strip search in violation of the Fourth Amendment.[5] The Seventh Circuit, unlike the Eleventh Circuit here, reversed and remanded the case because the district court improperly allowed prejudicial remarks during closing

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[3] Trial courts should not be put in the position of having to *attempt* curative instructions. Once such an inflammatory picture has been painted it cannot be effectively erased from the minds of the jurors by curative instruction, and this Court by its decision should not foster similar conduct in the future.

[4] Additionally other conduct of counsel prevented defendants from receiving a fair trial. Petitioners were denied a fundamentally fair trial when the district court abused its discretion in allowing testimony by deposition of a purported eyewitness. *Vineyard*, Godbold dissent, pp. 1216-1217. Judge Godbold correctly noted that the court never addressed the diligence question. *Id.* see also, United States v. Salerno, 505 U.S. ___, 120 L.Ed.2d 255 (1992).

[5] The Greenwood trial took place on February 27, 1992, during the first highly publicized trial of four Los Angeles police officers for the videotaped beating of Rodney King.

argument about the Rodney King incident. *Doe v. Burnham*, No. 92-3087, 92-4158, 1993 WL 384590 (7th Cir. Oct. 1, 1993); *see also Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221 (7th Cir. 1984). During closing argument, the plaintiff's attorney portrayed the police officers as liars, stating, "We do not like to believe that witnesses get up on the stand and lie, let alone police officers who are sworn to uphold and protect the law and serve and protect us, but we know it happens. We've seen it in the news, we've seen it on videotape." *Id.* The district court overruled defendants' objection and provided no limiting instruction advising the jury how to regard the statement.

The Seventh Circuit in *Doe v. Burnham, supra*, recognized that the Rodney King remarks during a closing argument greatly impacted upon the minds of jurors in considering the evidence. The Eleventh Circuit, which sits in Atlanta, where riots also occurred after the not guilty verdict of the police officers in the first Rodney King trial, overlooked the impact. Senior Circuit Judge Godbold did not, however. *See Vineyard*, Godbold dissent, p. 1214. He captured the essence of the trial and the impact the Rodney King incident has had on the judicial system. Judge Godbold, as did the Seventh Circuit in *Doe v. Burnham*, would have reversed the trial court and ordered a new trial. *Id.*

Not only have the Seventh and Eleventh Circuits experienced the aftermath of the Rodney King incident, but the Second Circuit has had to address the effect of the incident as well. The Second Circuit, as the Seventh Circuit, recognized the negative impact that the Rodney King incident has had on the jury system. An arrestee brought a civil rights suit against court security officers

where the jury found the officers liable for arrest without probable cause and malicious prosecution. The defendants challenged the awards of punitive damages, asserting that the awards were excessive and unfairly augmented by jury prejudice resulting from the first Rodney King verdict and the ensuing riot. The defendants argued that counsel for plaintiff made remarks in the closing argument which were intended to allude to the Rodney King incident. In denying the motion for new trial, the district court nevertheless found that the punitive damages were awarded, at least in part, as a result of the jury's passion and emotion in the wake of the Rodney King trial. *King v. Marci*, 800 F.Supp. 1157 (S.D.N.Y. 1992), *rev'd* 993 F.2d 294 (2nd Cir. 1993). The Second Circuit found more merit in other arguments and granted a new trial or remittitur. *King v. Marci*, 993 F.2d 294 (2nd Cir. 1993).[6]

The trial of the officers in *King v. Marci*, 800 F.Supp. 1157 (S.D.N.Y. 1992), has some similarities to the case at bar. In *King*, "plaintiff's counsel made a veiled reference to the Rodney King incident, and effectively appealed to the emotions of the jury, by arguing in his closing argument" to send a message to others in a position of authority not to abuse their authority. *King*, 800 F.Supp. at 1164.

Even though a "send a message" argument may be permissible in punitive damage cases, restraint must be exercised to limit the message to the parties. Presumably

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[6] The Third Circuit has not addressed this particular issue, but a state court there has. See Commonwealth v. McGeth, 622 A.2d 940 (Pa. Super. 1993). This criminal case and its closing argument is discussed below. See p. 21, *infra*.

others will get the message. Here, the combination of the blatant Rodney King incident and the overzealous send-a-message argument in violation of a pretrial ruling clearly shows how the jury's passion was improperly aroused. The Eighth Circuit does not condone this type of conduct. See *Scott v. James*, 902 F.2d 672, 674 (8th Cir. 1990), *cert. denied*, 498 U.S. 873 (1990). Neither does the Fifth Circuit. *See Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983); *Schluenes v. American Casualty Company of Reading, Pa.*, 528 F.2d 634, 638 (5th Cir. 1976). The approach taken by the Eleventh Circuit conflicts with the approaches taken by the Second and Seventh Circuits. No doubt, all circuits desire that parties receive a fair trial, as contemplated by the Seventh Amendment to the Constitution of the United States, but the *Vineyard* approach by the Eleventh Circuit erodes such protection.

In promoting fundamental fairness at trial, the Fifth Circuit has followed the general rule that improper comments from the bench or by counsel will not warrant reversal unless they so permeate proceedings that they impair substantial rights and cast doubt on a jury's verdict. *Bufford v. Rowan Companies, Inc.*, 994 F.2d 155 (5th Cir. 1993). The difference between the Fifth Circuit and the Eleventh Circuit is that the Fifth Circuit recognizes the permeation potential of improper Rodney King comments.

Here, the first remark by Plaintiff's counsel regarding the "Rodney King incident," in and of itself, created inherent unfairness to the Petitioners. It is undisputed that the remark was improper. The combination of this remark, the videotape remark and then the "send a message" argument, all of which violated pretrial rulings,

should have warranted a new trial and, more importantly, a fair trial as contemplated by the Seventh Amendment. The approach of the Eleventh Circuit, in dealing with this issue, not only conflicts with the Second and Seventh Circuits, but with general procedural law. It is well settled that counsel should avoid remarks or conduct calculated to appeal to the prejudice or sympathies of the jurors. *Jenkins v. Nicholson*, 162 F.Supp. 167 (E.D.Pa. 1958). Generally speaking, counsel must restrict his argument to the issues of the case, *Solorio v. Atchison T&S. F. Ry. Co.*, 224 F.2d 544, 547 (10th Cir. 1955), the applicable law, *Casso v. Penn. Railroad Co.*, 128 F.Supp. 909 (W.D. Pa. 1954), pertinent evidence, *Solorio* 224 F.2d 544, 546, and such reasonable inferences and deductions as may be drawn therefrom. *Id.* Counsel's strong appeals to the sympathy and passion of the jury, as in the case *sub judice*, lie beyond the permissive range of propriety. *Theriot v. Mercer*, 262 F.2d 754 (5th Cir. 1959), *cert. denied*, 359 U.S. 983 (1959). Ordinarily, a caution to disregard or other appropriate corrective action by the court will be considered sufficient to overcome the prejudicial effect of improper arguments of counsel. *C.I.T. Financial Corp. v. Glover*, 224 F.2d 44, 47 (2nd Cir. 1955). However, some arguments, as in the case at issue, given the unprecedented tidal wave of publicity, may be of such prejudicial character that the probable effect cannot be eradicated by corrective action taken by the court. *Indamer Corp. v. Crandon*, 217 F.2d 391, 394 (5th Cir. 1954). Improper arguments, remarks or conduct of counsel may result in a mistrial, or afford a ground for a new trial.

Fundamental fairness[7] is essential to the very concept of justice. *Lisenba v. California*, 314 U.S. 219, 236 (1941). Fundamental fairness is itself but one of many verbal formulations of the scope of due process as guaranteed by the Fifth Amendment. *See e.g., Hobby v. United States*, 468 U.S. 339 (1984). Fundamental fairness is the determinative factor in analyzing prosecutorial conduct. Although this was not a criminal case, plaintiff's attorney acted as prosecutor of plaintiff's case. Fundamental fairness and its principles are not unique to the criminal cases; these principles should apply in the civil context, and thus the principles lend instruction to the case at bar. The Eleventh Circuit has held that these guidelines for reviewing the effect of prosecutorial argument only come into play when an improper argument has been made. *Brooks v. Kemp*, 762 F.2d 1383, 1403 (11th Cir. 1985). The court first determines whether the argument was improper,[8] and if so, it then determines "the probable effect of the improper argument on the jury." *Presnell v. Zant*, 959 F.2d 1524, 1529 (11th Cir. 1992). The only question then, in this case, is what was the probable effect of

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[7] The fundamental fairness standard has evolved from capital felony cases and the courts' consideration of habeas corpus actions and other criminal appeals. The fundamental fairness standard adopts the "reasonable probability" test in reviewing prosecutorial arguments. See, Strickland v. Washington, 466 U.S. 668, 690 (1984); Brooks v. Kemp, 762, F.2d 1383, 1401 (11th Cir. 1985).

[8] In the context of a trial, case law is plentiful on subjects that should not be argued, e.g., hint of additional evidence not produced, facts not before the jury, personal opinions or beliefs, and the like. See *Brooks*, 762 F.2d at 1403, n.29; for other subjects, see also Petition, pp. 10-12.

the improper argument on the jury. The first remark about the "horrible Rodney King beating" had an unreasonable and unconscionable effect on the verdict.[9] *See Vineyard,* Godbold dissent, p. 1215. The second remark, immediately following on the heels of the trial court's "mild" corrective instruction, was outrageously calculated to inflame and prejudice the jury. *Vineyard,* Godbold dissent, p. 1216. Trial by video cannot and should not be tolerated. The trial by video of the officers involved in the Rodney King incident and the "cries of outrage from television and radio commentators and the print media, from public officials at all levels, and from pulpits across the country" created a national mob scene which Plaintiff's counsel unbelievably invoked in this case. *See Vineyard,* Godbold dissent, p. 1214. The blatant equation of the Rodney King incident with the facts then under consideration by the jury was so prejudicial that it required nothing less than the declaration of a mistrial *sua sponte.*

This Court, the Eleventh Circuit Court of Appeals and other courts often remind us in their respective writings, conferences and professionalism convocations that lawyers must conduct themselves professionally to protect the integrity of the judicial system. Conduct, such as in this case, erodes the system. This Court should seize this

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[9] This is analogous to the introduction of a victim impact statement, *not* at the sentencing phase of a criminal trial but, during the liability phase which is clearly prohibited. See, e.g., Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991). In the *Vineyard* trial, Defendants moved to bifurcate the trial. The motion was denied. Had bifurcation occurred the likelihood of a fundamentally unfair trial would have diminished.

opportunity to "send a message" to lawyers that such improbitious conduct will not be tolerated.

This Court has a unique opportunity to outline the parameters for arguments by counsel, as well as other outside influences in trial matters. Too often an overly wide latitude given to counsel creates a disruption in the calm and dispassionate jury deliberation. In today's litigious society, lawyers and their "Rambo" tactics more than fail to remain within the realm of niceties of professionalism; they violate fundamental rights. As Judge Godbold described, Plaintiff's counsel unabashedly began arguing about the Rodney King incident and then after the Court gave its curative instructions, Plaintiff's counsel continued his argument by saying "we do not have a video tape here," an example of utter disregard for the sovereignty of the court and fairness to the parties. *Vineyard,* Godbold dissent, p. 1216. There can be no doubt that the argued similarity of the Rodney King incident and this case played an important aspect in the jury's deliberation.

Not only does this Court have the opportunity to provide guidance to the lower courts in handling this emotional issue in closing arguments, but this case provides the Court with an opportunity to establish guidelines for the entire trial. Trial courts need this guidance to properly handle juries and their deliberations.

This issue could not be anymore current, to-wit: within the past week, jury deliberations[10] have been in

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[10] Two black men, Damian "Football" Williams and Henry Watson were acquitted on most of the felony charges on Monday, October 18, 1993, and deliberations were resumed on other charges.

the headlines of news reports from the trial of the perpetrators who beat a white motorist, Reginald Denny, during the riots after the first Rodney King trial, and recorded by a news reporter from a helicopter. "Accepting the defense argument that Williams and Watson were caught up in mob violence after the state Rodney King beating trial, the jurors acquitted them of most charges that required specific intent." Linda Deutsch, *L.A. pair cleared of most felonies*, The Atlanta Constitution, Oct. 19, 1993, at A1. No doubt the jurors considered the riots and what effect their verdict might have in Los Angeles. This Court and others will no doubt continue to hear appeals resulting directly or indirectly from the Rodney King incident.

The Ninth Circuit[11] has had, and will have, numerous issues to address because of the Rodney King incident and the trials involving the parties to the incident and subsequent riots. In a 42 U.S.C. § 1983 action, the court held that the district court should have conducted a "Batson" inquiry to determine whether defendants' peremptory challenge of an African-American juror violated the juror's constitutional right to sit on the jury and remanded the case for another district court judge to try the case. *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993). During the challenge, the trial judge stated that if the juror worked for a broadcasting company which broadcast the video of the Rodney King beating, sufficient grounds existed to excuse the juror. Additionally,

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[11] The issue of injection of the Rodney King incident into a closing argument has not been decided by the Ninth Circuit.

the case was reversed and remanded because of an evidentiary question concerning the admissibility of the Christopher Commission Report[12] regarding the practices and customs of the Los Angeles Police Department, and the apparent pro-police bias shown by the trial judge.

The Ninth Circuit rejected a criminal defendant's appeal of his conviction and sentence where he argued, *inter alia*, that the "civil unrest in Los Angeles following state court verdicts in the Rodney King beating trial denied him a fair trial." *United States v. Wheelock*, No. 92-50464, 1993 WL 290119 (9th Cir. July 30, 1993). The trial of Wheelock commenced shortly before the King rioting broke out, and could not resume for five days, because the juror could not get to the courtroom. A motion for mistrial was denied. *Id.*

Additionally, the Ninth Circuit affirmed the granting of a motion for summary judgment in an appeal where the appellant argued he was unable to file a timely written opposition to the motion for summary judgment because the district court was inaccessible due to the Los Angeles riots following the Rodney King trial. *See Brown v. Southern California Rapid Transit District*, 985 F.2d 571 (9th Cir. 1993).

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[12] The Mayor of Los Angeles at the time, Tom Bradley, launched an investigation of the Los Angeles Police Department headed by Warren Christopher. The report found problems and deficiencies in the Los Angeles Police Department. Daryl Gates, the Chief of Police, was asked to resign because of the incident and the findings in the Report. See Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993).

Further, the judicial system has dealt with media coverage of the notorious events. A publishing company filed a civil rights action against the City and County of San Francisco and several San Francisco police officers, alleging that the police conspired to confiscate 2000 to 4000 copies of its biweekly newspaper because the newspaper carried a critical account of how San Francisco police handled the demonstrations that followed the verdict in the Rodney King beating case. *Coming Up, Inc. v. City and County of San Francisco,* No. C-92-3714-DLJ, 1993 WL 325587 (N.D.Cal. August 9, 1993).

In *People v. Continola,* 15 Cal. App. 4th Supp. 20, 19 Cal. Rptr. 2d 225 (Cal. Super. Feb. 26, 1993), three defendants prevailed in having their convictions reversed and the cases dismissed. Each had been charged with violating the Los Angeles Curfew Law, enacted during the civil disturbances that followed the announcement of the verdict in the first Rodney King case.

In California, a police officer asserted that the Rodney King incident and its subsequent investigation led to his dismissal. He filed a civil rights action alleging that employment decisions were made in retaliatory discrimination against him in response to his appearance before the Christopher Commission. *Marshall v. Gates,* 812 F.Supp. 1050 (C.D.Cal. 1993). Summary judgment was entered in favor of the defendants.

In *Gomez v. Gates,* 804 F.Supp. 69 (C.D.Cal. 1992), the district court, ruling on an award of attorneys fees in an excessive force civil rights case, noted that the trial spanned thirteen weeks and presented complex questions

of fact and law, including "whether and how the Report of the Independent Commission on the Los Angeles Police Department (the 'Christopher Commission Report') could be used as evidence, a matter of first impression." *Gomez*, 804 F.Supp. at 71.

Not only has the Rodney King incident invaded the federal courts, state courts are wrestling with the ill-effects of the incident. The discussions in change of venue cases have reflected upon the incident. The Supreme Court of Mississippi considered an appeal of a conviction for sexual battery and kidnapping where venue was changed. *Simon v. State*, No. 90-KA-0904, 1993 WL 382317 (Miss. Oct. 1, 1993). In determining the issue of venue, the court considered the Rodney King incident and, several accounts reviewed in news articles and law review articles, to-wit: Note, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King*, 106 Harv. L. Rev. 75 (1993); Riley, "King Trial Fuels Bill on Fair Jury Selection," Newsday, June 3, 1992, at 25.

In Florida, a murder conviction was reversed and remanded for a change of venue, because of the Los Angeles riots following the April 29, 1992 acquittal of police officers in Simi Valley, California, for the videotaped beating of Rodney King. *State v. Gary*, 609 So.2d 1291 (Fla. 1992).

The four police officers tried in the California courts for illegally beating Rodney King sought and received a change in venue. *Powell v. Superior Court (People)*, 232 Ca. App. 3d 785, 283 Cal. Rptr. 777 (1991). They also filed a petition for writ of mandate to disqualify Judge Bernard

Kamins which was granted. *See Briseno v. Superior Court (People)*, 284 Cal. Rptr. 640 (1991).

Also in Florida, an appeal of a change of venue for the trial of an Hispanic police officer arising from deaths of black citizens in Miami was enhanced by the first Rodney King trial. *State v. Lozano*, 616 So.2d 73, (Fla. App. 1 Dist. 1993). The Court noted that it was governed by rules that ensure a fair trial, and *sua sponte* voided the order of the trial judge changing venue where the trial court began:

> [T]his court cannot ignore the national tragedy of the urban riots occurring after the Rodney King verdict on April 29, 1993. That so many of our Fellow Americans feel shut out from our judicial system demands our attention.

616 So.2d at 76.

Wisconsin has also been touched by the Rodney King incident. The Court of Appeals of Wisconsin held that an African-American juror should not have been placed in the jury array for the petit jury and later ordered to be placed on the voir dire panel even though he had not been randomly selected. *Oliver v. Heritage Mutual Ins. Co.*, No. 92-2934, 1993 WL 321004 (Wis. App. Aug. 25, 1993). Oliver objected to the venire of the jury, because no African-American appeared on the voir dire panel. In an attempt to avoid the appearance of impropriety, the trial court noted the acquittal of the police officers involved in the first Rodney King case which had occurred less than three weeks before and that the "judicial system had taken on a 'real negative impression with the citizenry

across the country because, in part, there were no African-Americans on the jury.' " *Id.*

The Supreme Court of Minnesota affirmed a conviction of first and second degree murder in an appeal involving misconduct of a juror who contacted the media during the trial. *State v. Landro,* 504 N.W.2d 741 (Minn. 1993). The juror called a reporter during the course of the trial to express his view that the case raised similar issues to the Rodney King incident and trial. The court found that the juror had not prejudiced any other juror and thus affirmed the conviction.

The Court of Appeals of Minnesota did not consider justification as an explanation of a refusal to submit to a breath test where the defendant, a Nigerian medical student, feared he would not receive a fair result, because the incident occurred during the week of the Rodney King trial. *Ekong v. Comm. of Public Safety,* 498 N.W.2d 319 (Minn. App. 1993).

Prosecutors who have referred to "hero cops" in direct response to defense counsel's reference to the Rodney King incident have exceeded the bounds of fair response to defense counsel's argument. *Commonwealth v. McGeth,* 622 A.2d 940, 942 (Pa. Super. 1993). The trial court should have admonished the defense counsel when he alluded to the Rodney King incident, saying: "we're not in Los Angeles. There wasn't somebody with a recorder to record what happened here."[13]

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[13] The comments by defense counsel in *Commonwealth v. McGeth* are almost identical to the words of Respondent's counsel when he "drew the second arrow from his quiver", stating,

The effect of the King incident has not been limited to criminal actions, voir dire, closing arguments, civil cases and peremptory challenges. It has eroded the public confidence in the integrity of the judicial system. *See, e.g., State ex. rel. Beacon Journal Publishing Co. v. Radel,* 82 Ohio App. 3d 193, 611 N.E.2d 520 (Ohio App. 5 Dist. 1993) (case concerning the sealing of public criminal records).

In *State v. Mitchell,* 169 Wis. 2d 153, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom, Wisconsin v. Mitchell,* 508 U.S. ___, 124 L.Ed.2d 436 (1993), the Supreme Court of Wisconsin found a "hate crimes" statute to be unconstitutional, because it violated the First Amendment. In reaching this conclusion, the Supreme Court of Wisconsin considered the Los Angeles riots sparked by the acquittal of four white police officers accused of illegally beating black motorist Rodney King and the subsequent vicious beating of white truck driver Reginald Denny by black rioters, horrifyingly captured on film by a news helicopter. The Court stated that "[A]s disgraceful and deplorable as these and other hate crimes are, the personal prejudices of the attackers are protected by the First Amendment." 485 N.W.2d at 817.

In the case at bar, the district court and the Eleventh Circuit have ignored the effect of the Rodney King incident on our judicial system. Petitioners submit that this Court should not ignore this national tragedy and must grant certiorari in this case to reassure all citizens of a fair

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"there was no video tape in this case", immediately following the trial court's mild curative instructions. See *Vineyard,* Godbold dissent, p. 1216.

trial, without improbitious conduct to incite the jury into a sympathetic, empassioned, prejudiced body.

Petitioners therefore respectfully submit that plenary review by this Court is required to correct the Eleventh Circuit Court of Appeals' opinion; to resolve the split in the approach toward improper remarks made during a closing argument taken by the various Circuit Court of Appeals; and to give further guidance to lower courts on this important issue and its effect on a trial.

B. The Eleventh Circuit decision has created a confusing precedent in its treatment of the closing argument.

In *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990), Circuit Judge Cox participated in a *per curium* decision which affirmed the trial court's grant of a new trial because counsel focused on a theory which had been eliminated in the pre-trial conference and on evidence excluded by the judge. The court stated that these remarks were so unwarranted that they were obviously prejudicial and thus a contemporaneous objection to an improper argument was not necessary "where the interest of substantial justice is at stake." *McWhorter v. City of Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). The *Vineyard per curium* panel decision is inconsistent with the *per curium* decision in *McWhorter v. City of Birmingham*. In *McWhorter* the trial judge focused on the improper argument despite the lack of an objection and granted a new trial. Here the trial court heard a proper objection, and, before the objection could be completed and a motion for mistrial stated, the trial court sustained the objection as

soon as it was uttered. Judge Godbold, in his dissenting opinion, correctly assessed the situation when he noted that "counsel then began to state a ground, and the court terminated the dialogue with its remark about matters in California." *Vineyard*, Godbold dissent, p. 1216.

Judge Godbold was also correct when he noted that:

> Plaintiff's counsel did not stop after the corrective instruction. He drew the second arrow from his quiver, "there was no videotape in this case," a backhanded way of reminding jurors again of the alleged brutalization of Rodney King, which had been brought to life, and then memorialized, by a videotape. (*Id.*)

The Eleventh Circuit has stated that it does not tolerate emotional and bombastic references such as those made by counsel for Respondent when he argued "the horrible Rodney King beating that most of you witnessed on television, . . . the issue of police brutality was brought to the forefront of the news across the country." (App. p. 54a). *See Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984). However, the *Vineyard* decision creates uncertainty in the Eleventh Circuit as to what is an improper remark. Counsel's remarks undermined any confidence in the outcome of the case. The egregious remarks denied Petitioners due process, because a greater than reasonable probability existed that, but for the offending remarks, the outcome of the trial would have been different. *See United States v. Eyster*, 948 F.2d 1196, 1207 (11th Cir. 1991). The remarks were not abstract references to matters within the jury's common knowledge, but were references to a specific notorious event calculated to inflame and prejudice the jury, at least causing a much greater award of damages

than justified by the evidence.[14] *See United States v. Phillips*, 664 F.2d 971, 1030 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982).

As this case was a reported decision, it is binding precedent in the Eleventh Circuit and will undoubtedly be utilized within the circuit by lawyers as an excuse or justification to inflame jurors and send jurors into a xenophobic rage. This was not the intent of the district court on the *per curium* panel, but advocates will wield this case as a sword. Therefore, Petitioners submit that this Court review the Eleventh Circuit decision because of its importance and provide appropriate guidance to correct the Eleventh Circuit's lack of uniformity; to resolve the conflict among the circuits; and to provide further guidance to the lower courts and lawyers on this subject.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Eleventh Circuit decision is of such importance that it should be reviewed by the Court, and Petitioners respectfully request the Court to enter an order granting this petition for a writ of certiorari.

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[14] The trial court recognized that the verdict of $195,000 was "at the outer limits of an acceptable verdict." [App. p. 26a]. A new trial should have been granted because of the excessive verdict awarded due to these egregiously improper remarks. Plaintiff sought $130,000 in attorney's fees before agreeing to a much lesser amount. Plaintiff seeks an additional $13,000 for the appeal in the Eleventh Circuit. See *Vineyard*, Godbold dissent, p. 1216, n.3.

Respectfully submitted, this 22nd day of October, 1993.

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No. _____

In The

Supreme Court of the United States

October Term, 1993

COUNTY OF MURRAY, GEORGIA, ET AL.,

Petitioners,

versus

JOHNNY VINEYARD,

Respondent.

APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8601

JOHNNY VINYEARD [sic],

Plaintiff-Appellee,

versus

COUNTY OF MURRAY, GEORGIA, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed JUL 28 1993)

Before: COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

Johnny VINEYARD, Plaintiff-Appellee,

v.

COUNTY OF MURRAY, GEORGIA, Bill Hansird, as former Sheriff of Murray County, Monte Chastain, Robert Bishop, Defendants-Appellants.

No. 92-8601.

United States Court of Appeals,
Eleventh Circuit.

May 17, 1993.

Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

Plaintiff, Johnny Vineyard, brought this 42 U.S.C. § 1983 action against Murray County, Georgia, Robert Bishop and Monte Chastain, two former deputies of the Murray County Sheriff's Department, and William Hansird (Sheriff Hansird), in his individual capacity and his official capacity as sheriff of Murray County during the relevant events. Vineyard alleges that the defendants violated his rights under the Fourth, Fifth, and Fourteenth Amendments.

Vineyard claims that Bishop and Chastain, after arresting him following a domestic dispute, repeatedly threatened him and beat him in the face and chest while he was handcuffed to a hospital bed. Vineyard alleges that the Sheriff's Department had inadequate policies of supervision, training and discipline of its deputies, which caused the violation of his rights by Bishop and Chastain.

The case was tried to a jury. After the close of the evidence, the court directed a verdict in favor of Sheriff

Hansird in his individual capacity, but denied motions for directed verdicts for Hansird in his official capacity, the County and Chastain. The jury returned a verdict in favor of the plaintiff and against each of the defendants remaining in the case. The district court denied the defendants' motions for judgment notwithstanding the verdict, for remittitur and to amend judgments and denied Murray County's motion for new trial. The defendants appeal. We affirm.

I. FACTS[1] AND PROCEDURAL HISTORY

At the time the events giving rise to this case occurred, Johnny Vineyard and his wife, Debra, were separated and involved in divorce proceedings. Very early one morning, Johnny went to the house where Debra was living. He had been drinking beer and was intoxicated. Debra refused to let him in the house so he broke a glass pane in the door with his fist. The two began to fight. At Debra's request, the woman who lived in the house with her called the Sheriff's Department. By the time Deputies Bishop and Chastain arrived, Debra and Johnny had calmed down and were on the porch waiting for them. The officers arrested Johnny and drove him to a hospital to care for the cuts on his hand.

When they arrived at the hospital, the deputies handcuffed one of Johnny Vineyard's arms to a bed in an

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[1] The defendants seek review of the district court's refusal to direct a verdict in their favor. We, therefore, relate the facts in the light most favorable to Vineyard. We note, however, that Vineyard's version of what occurred, particularly at the hospital, was hotly disputed at trial.

emergency room. While in the emergency room he was nervous so he took a pill, the last of a bottle that his doctor had prescribed to control anxiety and depression. The officers discovered the empty bottle and suspected that Vineyard had overdosed on the drug. Along with the medical personnel at the hospital, they attempted to forcibly empty Vineyard's stomach by trying to make him drink a substance that would make him vomit.

Vineyard adamantly refused to drink the substance. He attempted to explain that he had taken only one of the pills and insisted that the medication was prescribed by his doctor. The officers told those who were present in the room to leave and that when they came back, Vineyard would cooperate.

When Vineyard was alone with the officers, while he remained handcuffed to the bed, they beat him repeatedly in the head and chest. A scar from earlier heart surgery and a pacemaker were visible on his bare chest. Bishop delivered most of the blows; Chastain did nothing to stop Bishop and also struck Vineyard several times in the ribs. Vineyard, afraid and in pain, cried out loudly for help, but no one responded.

When the hospital staff returned, the nurse or technician used a tube through Vineyard's nose to lavage or irrigate his stomach. The doctor discovered no pill fragments when Vineyard's stomach was emptied.

The officers later took Vineyard to the jail, where he continued to suffer considerable pain. He wanted to go back to the hospital so he used his pocket knife to cut his wrist to fake a suicide attempt. His ploy worked; the

officers returned him to the hospital. A medical examination revealed that his jaw was broken.

At the time of trial, three and a half years after the morning of the incident, Vineyard continued to suffer substantial pain from the primary injury caused by the beating, a broken jaw. He has undergone two surgical operations and treatment for the pain associated with this injury.

At the time of Vineyard's arrest, Hansird was Sheriff of Murray County. At trial, the court instructed the jury that Hansird had the authority to make policy for Murray County in the area of law enforcement. Sheriff Hansird, Robert Bishop, Monte Chastain and Professor James David White, an expert in police operations, testified regarding the policies of the Murray County Sheriff's Department.

At the close of the evidence, the court directed a verdict in favor of Sheriff Hansird in his individual capacity, but denied his motion for a directed verdict in his official capacity. The jury returned a verdict in favor of the plaintiff and against all remaining defendants. Pursuant to the jury's verdict, the court entered a judgment against the defendants, jointly, awarding $115,000 in compensatory damages, along with $60,000 in punitive damages from Bishop and $20,000 in punitive damages from Chastain.

II. ISSUES ON APPEAL

The defendants raise a number of issues on appeal.[2] Only two merit discussion.

Sheriff Hansird, in his official capacity, and Murray County[3] assert error in the district court's denial of their motion for directed verdict based on the lack of evidence to prove a custom of inadequate policies and procedures that caused the abusive treatment of Vineyard.

All of the defendants contend that the district court erred in denying their motion for a mistrial, which was based on the potentially prejudicial impact of certain arguments made by Vineyard's counsel. Defendants sought the declaration of a mistrial because Vineyard's counsel made comparisons and references to the Rodney

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[2] In addition to the two issues we discuss, the defendants contend that the district court erred in the following respects: (1) allowing the deposition testimony of Johnnie Jones Allison to be used at trial; (2) failing to grant a new trial because of an excessive verdict; (3) failing to grant a directed verdict in favor of Monte Chastain on the claims that he used excessive force and that he should have intervened to stop Bishop from beating Vineyard; (4) refusing to bifurcate the trial of the individual officers and the trial of the Sheriff and Murray County; (5) refusing to charge the jury according to the defendants' suggested instructions regarding the reasonableness of the use of force. Each of these contentions is meritless.

[3] "For liability purposes, a suit against a public official in his official capacity is considered a suit against the local government entity he represents." *Owens v. Fulton County*, 877 F.2d 947, 951 n. 5 (11th Cir.1989). The district court explained in its instructions to the jury that the Sheriff is a county official whose acts and decisions can establish the policy for the County. [Trial Transcript, R. 14 at 558-60.]

King incident, a widely publicized case of alleged police brutality in California, and asked the jury to send a message to the Murray County officials.

III. STANDARDS OF REVIEW

When reviewing the denial of a directed verdict, we consider "whether the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable men could not arrive at a contrary verdict." *Chouinard v. Chouinard*, 568 F.2d 430, 433 (5th Cir.1978).[4] Merely a scintilla of evidence will not be sufficient to avoid a directed verdict; there must be substantial evidence. *Cunningham v. United States*, 553 F.2d 394, 395 (5th Cir. 1977).

We review the district court's denial of a mistrial for abuse of discretion only. *Jonas v. City of Atlanta*, 647 F.2d 580, 586 (5th Cir. Unit B June 1981).

IV. DISCUSSION

A. County Liability

We begin our analysis of any excessive force claim by "identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870, 104

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[4] This court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

L.Ed.2d 443 (1989). We determine whether a constitutional violation has occurred by applying the standards applicable to that particular constitutional provision. *Id.* 490 U.S. at 394, 109 S.Ct. at 1871. Only when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury arise. To attribute liability to a municipality under § 1983, the plaintiff must demonstrate that the municipality had an official policy that was "the moving force of the constitutional violation." *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981); *Parker v. Williams,* 862 F.2d 1471, 1477 (11th Cir.1989) (both citing *Monell v. Department of Social Servs.* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978)).

1. *The Source of the Right To Be Free From Excessive Force*

Our first task is to identify the constitutional right at issue. Vineyard claims that his rights under the Fourth, Fifth and Fourteenth Amendments were violated by the use of excessive force by Chastain and Bishop. It is unclear, however, whether a pretrial detainee's claim that officers used excessive force against him states a cause of action under the Fourth Amendment. *Graham,* 490 U.S. at 395 n. 10, 109 S.Ct. at 1871 n. 10.; *Wright v. Whiddon,* 951 F.2d 297, 300 (11th Cir.1992). In contrast, the law is well established that pretrial detainees may bring § 1983 actions to redress violations of their rights under the Due Process Clause of the Fourteenth Amendment, which "protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham,* 490 U.S. at

395 n. 10, 109 S.Ct. at 1871 n. 10 (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39, 99 S.Ct. 1861, 1871-74, 60 L.Ed.2d 447 (1979)).

The Defendants do not contest that Vineyard's description of the beating, if true, would constitute a violation of Vineyard's rights whether considered under either the Due Process Clause's protection of pretrial detainees from punishment or the Fourth Amendment's protection from unreasonable seizures. Defendant Chastain argues only the insufficiency of the evidence to prove that Chastain participated in the beating and that he should have prevented Bishop from beating Vineyard, but we find that evidence to be sufficient. Defendant Bishop does not contest the sufficiency of the evidence supporting the jury's verdict against him. Consequently, we need not decide whether the Fourth Amendment, in addition to the Due Process Clause of the Fourteenth Amendment, is a source of constitutional protection of a pretrial detainee's right to be free from the use of excessive force.

The finding that Bishop and Chastain violated Vineyard's constitutional rights does not necessarily mean that Murray County is liable for that violation. The doctrine of respondeat superior does not apply in § 1983 cases. *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036. Counties may be liable under 42 U.S.C. § 1983 for deprivations of constitutional rights when the county has an official policy that was the "moving force of the constitutional violation." *Id.* at 694, 98 S.Ct. at 2037.

We address the proof of the County's policies and the evidence of causation below.

2. *Murray County's Inadequate Policies of Training, Discipline and Supervision*

The Supreme Court considered the attribution of liability to a municipality on a claim of inadequate training of the municipality's officers in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). In *Canton*, the Court held, "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 389, 109 S.Ct. at 1205.

Vineyard's claim against Murray County is similar to the one considered by the Court in *Canton*. Whereas the plaintiff in *Canton* presented only a claim of inadequate training, Vineyard claims that the county had inadequate policies for training, supervision and discipline. The district court instructed the jury that the appropriate standard to apply is one of deliberate indifference.

We have noted that a single constitutional violation may result in municipal liability when there is "sufficient independent proof that the moving force of the violation was a municipal policy or custom." *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1504 n. 10 (11th Cir.1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654, *and* 476 U.S. 1124, 106 S.Ct. 1993, 90 L.Ed.2d 673 (1986). At trial, Vineyard presented evidence regarding this particular incident, and he offered independent evidence that the county's policies regarding the supervision, discipline and training of deputies in the Sheriff's Department were the moving force of the constitutional violation.

The evidence demonstrates that the Sheriff's Department had inadequate procedures for recording and following up complaints against individual officers. Sheriff Hansird testified that it was not unusual to receive complaints. He and Professor White testified that the dispatcher or whoever answers the telephone has discretion about the initial handling of the complaint. Sheriff Hansird also said that the Department does not log complaints. Professor White explained that a policy of logging complaints is important for the warning such recorded complaints can provide. A record of complaints gives the sheriff notice that a particular officer may have a problem that could be corrected through reassignment, discipline or training.

The manner in which the Sheriff investigated this incident evidences a policy of deliberate indifference to the rights of the County's inhabitants. To follow up on complaints regarding the officers' treatment of Vineyard, Sheriff Hansird sent Bishop and Chastain, the two officers involved, to obtain statements from the witnesses. The problems with this decision are obvious. Professor White testified that such a procedure violates "every basic tenet" of proper complaint investigation. (R. 12 at 261.).

In addition the evidence indicates that no one in the Department completed a police report describing the circumstances of Vineyard's arrest. Sheriff Hansird testified that the absence of a report was unusual and that he was unsure whether one existed for Vineyard's arrest. Professor White never saw an arrest report for this incident. Bishop did not know if anyone made a report. Chastain

did not know if anyone completed a report; he saw only a partial report.

Vineyard presented other evidence of inadequate policies. Although Sheriff Hansird had been sheriff for a number of years, the Department had no policies and procedures manual. Professor White explained to the jury how such manuals give specific guidance to deputies and to their supervisors about appropriate conduct and discipline or training. He concluded by saying, "If you don't give that [the guidance of written policies and rules] to the officers, if you just say go on out their and use your head, it depends on what head they have got on as to which one they will be using in the field." (R. 12 at 265.).

We find substantial evidence supporting the jury's conclusion that Murray County had inadequate policies of supervision, discipline and training of deputies in the Murray County Sheriff's Department and that these policies demonstrated the deliberate indifference of the County to the rights of arrestees to be free from the use of excessive force by the County's deputies.

3. *County Policies Were the Moving Force of the Violation*

The existence of an official policy is insufficient to impose liability on the county. *Canton*, 489 U.S. at 390, 109 S.Ct. at 1205. Vineyard must also show that the policy was the moving force of the constitutional violation. *See id.* In *Canton*, the Court stated the proper inquiry to be, "Would the injury have been avoided had the employee been trained [and supervised and disciplined] under a

program that was not deficient in the identified respect[s]?" *Id.* at 391, 109 S.Ct. at 1206.

The testimony of Professor White supports the jury's finding of causation. When asked to assume Vineyard's version of what occurred at the hospital to be true, Professor White offered his opinion that these events would not have occurred if the county policies were such that officers knew they must report any confrontations, that others could call the Sheriff's Department to report complaints to the department, and that the department would investigate the complaints. The purpose of such policies, White explained, is to stop the use of gratuitous force. He also opined that without at least "the minimum policies in effect to measure [police] behavior and to address problems when they arise, then it's my opinion that it's not if abuses will occur, it's when they're going to occur. . . . " (R. 12 at 270.).

The record includes substantial evidence supporting Vineyard's contentions. The district court, therefore, did not err in denying the motion for directed verdict in favor of Murray County and Sheriff Hansird in his official capacity.

B. Closing Argument

Defendants also challenge the district court's refusal to grant their motion for a mistrial, which they based on the claim that Vineyard's counsel made inappropriate statements during his closing argument. We consider "the entire argument, the context of the remarks, the objection raised, and the curative instruction to determine whether the remarks were 'such as to impair gravely the calm and

dispassionate consideration of the case by the jury.' " *Allstate Ins. Co. v. James*, 845 F.2d 315, 318 (11th Cir.1988) (quoting *Spach v. Monarch Insurance Co.*, 309 F.2d 949, 953 (5th Cir.1962)).

We begin by setting out the portions of the argument to which the defendants object. Vineyard's counsel began his closing argument by stating.

> If there is anything good or positive that came out of the horrible Rodney King beating that most of you witnessed on television, [it] is that the issue of police brutality was brought to the forefront of the news across the country and it gave a lot of people the opportunity to realize that police brutality does occur.

(R. 14 at 500.). The defendants objected without stating a ground. The court sustained the objection and instructed the jury as follows:

> What happened in California, and even though he didn't mention California, that's where it happened, really doesn't have anything to do with this case. This case is to be tried upon the evidence in this case.

(*Id.*). Vineyard's counsel then continued his closing argument by noting that there is no video tape in this case so the jurors would need to evaluate the evidence to decide what happened on the morning in question.

Toward the end of his closing argument, Vineyard's attorney asked the jury to award punitive damages. He said,

> The reason these punitive damages are so important is because the punitive damages send

> a message back to everybody in Murray County. They send a message to the politicians there, the sheriff that's in office there, and the deputies that are involved there. You, by your verdict today, if you find that Johnny was beaten by the deputies, you'll send a message back to them. If you return a low verdict with low or no punitive damages, you'll tell them that you have given them your approval for this kind of behavior and that it's okay to occasionally beat a fellow up like this.
>
> If you return a large verdict and tell the sheriff it's time to get some of those policies and procedures in effect so this won't happen again, tell the deputies think twice before you get into this kind of situation and use excessive force on a fellow. You'll tell the politicians there.

(R. 14 at 514.). At this point, the defendants objected and, outside the hearing of the jury, requested a mistrial. They explained that the combination of references to the Rodney King incident and requests that the jury send a message to the Murray County officials violated the pretrial rulings of the district court. The judge denied the motion and instructed the jury as follows:

> Ladies and gentlemen, let me interrupt just a moment to point out to you that the purpose of a verdict is not really to send messages out generally to people. The purpose of a jury verdict, if it is awarding damages, is to compensate a plaintiff if he's entitled to an award of damages, and in some instances it may be appropriate to award punitive damages, if it is appropriate to award punitive damages, then

> that is done to punish a defendant or defendants, and that's the real purpose of damages, if it's appropriate to award them.

(R. 14 at 515). The defendants conclude that the court's cautionary instructions were inadequate to cure the harmful effect of the improper argument and that a mistrial was the only appropriate remedy.

We are reluctant to set aside a jury verdict because of an argument made by counsel during closing arguments. *See Allstate,* 845 F.2d at 318. The district judge had the opportunity to observe and control the tone of the argument and to determine its impact on the jury. The challenged arguments were not clearly violative of the pretrial order,[5] and the court gave curative instructions to avoid any prejudice that might otherwise have resulted from the argument. We find no abuse of discretion in the district court's denial of the defendants' motion for a mistrial.

V. CONCLUSION

The defendants have not demonstrated error in any of the district court's rulings challenged on appeal.

AFFIRMED.

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[5] The pretrial conference discussions among the parties and the judge regarding other trials appear to contemplate specifically the inappropriateness of mentioning other cases involving these parties that are not relevant to this case. It is unclear from the transcript of the pretrial conference whether the judge considered the inappropriateness of references to other instances of alleged excessive force, such as the Rodney King incident.

GODBOLD, Senior Circuit Judge, dissenting:

I would reverse this case. The defendants did not have the kind of trial to which they were entitled. Plaintiff counsel's egregiously improper arguments to the jury would, by themselves, require reversal, but other events added to the unfairness of the trial.

Few matters in modern times have rubbed raw the emotions of individual citizens, and of American institutions, as have the Rodney King events. King was beaten by Los Angeles police on March 3, 1991. The videotape of the incident, fortuitously made by a citizen observer, was released to the public on March 5, 1992 and shown over and over again on television for weeks. Steven S. Lucas and Eric W. Rose, *The Jury Saw All of the Evidence,* L.A. Times, Apr. 30, 1992, at B7. The matter swept across our country like a prairie fire, arousing cries of outrage from television and radio commentators and the print media, from public officials at all levels, and from pulpits across the country. *See, e.g.,* Seth Mydans, *The Police Verdict,* N.Y. Times, Apr. 30, 1992, at A1 (stating that Pres. Bush said he was "sickened" by the video). The U.S. Justice department began a nation-wide review of all police brutality complaints. Mayor Bradley launched an investigation of the Los Angeles Police Department headed by the Christopher Commission, which recommended that L.A. Police Chief Darryl Gates retire. *Id.*[1]

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[1] Subsequent events shed additional light on public feelings. State criminal charges against the Los Angeles police officers went to trial on March 4, 1992, six weeks after the instant case began. On April 29, 1992 the jury issued its verdict acquitting the defendants of all offenses except for one count against

The trial in this case began January 21, 1992, and continued on January 23 and 24, then on January 27 and 28. On the 28th, with the first breath of his closing argument to the jury, plaintiff's counsel threw the skunk in the jury box.

> MR. DEAN (Counsel for plaintiff): If there is anything good or positive that came out of the horrible Rodney King beating that most of you witnessed on television, is that the issue of police brutality was brought to the forefront of the news across the country and it gave a lot of people the opportunity to realize that police brutality does occur.
>
> MR. DAVIS (Counsel for defendants): Excuse me, Your Honor, I'm going to object at this point.
>
> THE COURT: I'll sustain your objection.
>
> MR. DAVIS: That has nothing to do –

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one defendant, on which the jury was hung and a mistral declared. Whether rightly or wrongly the verdict was denounced by commentators across America and around the world. *See, From the Nation's Newspapers,* L.A. Times, May 4, 1992, at A9 (quoting American newspapers); *The Whole World Watches – and Reacts – to L.A. Riots,* L.A. Times, May 5, 1992, World Report, at 2 (quoting international newspapers). Los Angeles suffered two days of rioting resulting in 58 dead, 4,000 injured, 12,000 arrested, and $1 billion of damage. *Pulling Together?,* The Economist, May 9, 1992 (U.K. ed.), at 55. Less severe rioting occurred in such widespread cities as Seattle, Atlanta, New York, San Francisco, Las Vegas, and Tampa. Edith Stanley and David Treadwell, *Violence Continues for Second Day,* L.A. Times, May 2, 1992, at A7. Now, when this dissent is written, two officers have been convicted on federal criminal charges.

> THE COURT: What happened in California, and even though he didn't mention it was California, that's where it happened, really doesn't have anything to do with this case. This case has to be tried upon the evidence in this case. So go ahead.

Rec. 14, p. 500. Counsel's remarks were not accidental. They were not inadvertently uttered in the heat of mid-argument. They were not reply in kind. They were deliberate. This was a naked, outrageous, and unprofessional appeal to what was then – and is now – a matter of deep concern and high emotion for millions of Americans.[2]

The similarity of the cases is obvious: a criminal suspect in custody, allegedly drunk or under drugs, allegedly raging out of control and impossible for arresting officers to handle, plus evidence that the suspect is beaten and seriously injured through excessive force against which he is unable to defend himself. Twice counsel worked into his statement the catch phrase "police brutality."

The trial court should have stopped the proceedings instantaneously, declared a mistrial, and sanctioned counsel. Instead, presumably caught by surprise, the court gave a mild corrective instruction to the effect that what happened in California has nothing to do with this case,

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[2] The opinion of this court, n. 5, points out that there were discussions at the pre-trial about the inappropriateness of mentioning other cases of alleged police misconduct. The court did not forbid mention of the Rodney King incident; that did not specifically come up. The implication by plaintiff that the remarks of counsel were excusable because not forbidden ahead of time by court order is disingenuous.

and that the case was to be tried on the evidence in the case. This was not enough. It was too mild. And it did not address the real problem. Of course the case was to be tried on the evidence. But the judge's comment did not address the crucial concern, which was *the impact of counsel's statement upon the minds of jurors in considering the evidence.* At a minimum the court should have carefully explored with jurors whether they could consider the evidence and reach a fair verdict free of the effect upon their minds of what plaintiff counsel had said, of the matter to which counsel referred, and of the national concerns that had arisen from it. Moreover, the corrective instruction was directed to California matters. But the problem was not merely what happened in California. The Rodney King case had inflamed a country and had become a national issue.

Defense counsel objected and moved for a mistrial. This court points out that he did not state a ground for his objection. But the court sustained the objection as soon as it was uttered. Counsel then began to state a ground, and the court terminated the dialogue with its remark about matters in California. In any event, if ever there was a case where everyone knew the ground of the objection, this was it.

The above is not all. Plaintiff's counsel did not stop after the corrective instruction. He drew the second arrow from his quiver, "there was no video tape in this case," a backhand way of reminding jurors again of the alleged brutalization of Rodney Kind, which had been brought to light, and then memorialized, by a videotape.

I do not share the confidence of the trial court, stated in denying a post-trial motion, and of my colleagues, that, bearing in mind the court's instructions, counsel's improper remarks really did not make a difference. This case could not be cured with a Bandaid.

Later counsel made another inappropriate argument on a different subject, this time with respect to punishing the politicians of the county by awarding punitive damages. The argument and the court's response are set out in the opinion of this court. Perhaps this statement by itself was not ground for mistrial. But dense counsel pointed to the cumulative prejudice created by the Rodney King statement and the "punish the politicians" statement.

Plaintiff should not be rewarded in this case by judgments totalling $195,000, an amount that the trial court recognized, in ruling on pre-trial motions, was "at the outer limits of an acceptable verdict."[3]

While it is not necessary that I address the matter in full detail, I would reverse on the sole ground that the court abused its discretion in allowing testimony by deposition of Johnnie Jones Allison. Ms. Allison was plaintiff's key witness. By her deposition she testified at length to plaintiff's being beaten and otherwise mistreated at the hospital. The evidence of what occurred there, as this court notes, was hotly, disputed. Ms. Allison is the

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[3] Plaintiff claims attorneys fees in the amount of approximately $130,000. The record reflects that the parties resolved this claim without the necessity of any action by the court. It does not reveal an amount, but it is fair to assume that the amount was not nominal.

source of substantial parts of the recital of evidence in plaintiff's favor set out by this court.[4]

Briefly summarizing a series of events, here is what happened about the deposition. After trial proceedings had begun plaintiff's counsel notified the court that he would offer the deposition of Ms. Allison on the ground she was unable to attend because of illness. *See* F.R.Civ.P. 32(a)(3)(C), FRE 802, 804 (a)(4), (b)(1). Defendant objected and a couple days later, after inquiry, produced evidence tending to show Ms. Allison was not unable to come to court. Plaintiff was never able to prove that Ms. Allison was physically unable to appear. Indeed, after several submissions to the court extending over several days, the court found that plaintiff had only succeeding in buttressing that Ms. Allison was not physically unable to come. Plaintiffs counsel knew, from talking to Ms. Allison about trying to get a doctor's excuse for her, that she did not want to come to court. When unavailability because of illness began to abort as a ground, plaintiff's counsel engaged in a belated whirlwind of activity trying to serve a subpoena on Ms. Allison at her home, through a private detective, a relative of Ms. Allison, and by counsel himself. *See* Fed.R.Civ.P. 32(a)(3)(D). But she had departed ahead of the process servers. Defense counsel tried to find her with a subpoena but could not.

Faced with this situation, the court recognized that the issue before it had changed from alleged unavailability because of illness to inability to procure testimony of the witness by subpoena. As the court

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[4] See note 1 of this court's opinion.

phrased it, the question was "diligence in trying to get her as it might impact on unavailability." Rec. 13, p. 359. The court orally discussed the events that tended to show inability to serve a subpoena and held that, since Ms. Allison could not be reached by subpoena and adversary counsel had been present at her deposition with adequate opportunity to cross examine, the deposition would be allowed as testimony. But a critical finding was missing. The court had recognized that diligence by the plaintiff was an issue, but it never addressed that question.

Establishing a predicate for using a deposition over objection is not a mere nicety. Under FRE 801(c) the deposition is hearsay. *U.S. v. Salerno*, ___ U.S. ___, ___-___, 112 S.Ct. 2503, 2506-07, 120 L.Ed.2d 255 (1992). Fed.R.Civ.P. 32(a)(3) simply acts as an exception permitting admission of deposition testimony when the witness is unavailable to testify at trial. *See* Michael H. Graham, *Federal Practice and Procedure* § 6793, at 776 n. 2 (interim ed. 1992); 11 James W. Moore et al., *Moore's Federal Practice* § 804.04[1], at VIII-262 (2d ed. 1993). Deposition testimony may also be offered as a hearsay exception under FRE 804(b)(1), but that too requires unavailability. In considering unavailability under Rule 32(c)(3) and under FRE 804 plaintiff must show appropriate diligence. Moore *supra*, § 804.03[5], VII-255-58. The court did not address this point. It was error to permit use of the deposition without proof of, or even consideration of, diligence.

This case should be tried properly with restraint on the part of plaintiff's counsel and with Ms. Allison present or proper predicate laid for her deposition. Defendants are entitled to no less.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Johnny Vineyard

Plaintiff,

v. CIVIL ACTION
4:-89-cv-149-HLM

County of Murray, Georgia,
Bill Hansird, Monte Chastain
and Robert Bishop,

Defendants.

ORDER

(Filed May 27, 1992)

This case is before the Court on Defendant's Motion For Judgement Notwithstanding the Verdict, Motion for a New Trial and Motion to Amend Judgments and for Remittitur, and on Plaintiff's Motion for Attorney's Fees and Costs.

Defendants assert ten grounds for their various motions. The first of these grounds is that this Court's refusal to grant a mistrial based on the Plaintiff's closing argument constitutes reversible error. Defendants claim that the Plaintiff's references to the Rodney King beating incident, and Plaintiff's admonition to "send a message" to the politicians in Murray County, deprived the Defendants of a fair trial. This Court does not agree. The Court instructed the jury to focus on the evidence in this case, and that the purpose of the trial was to compensate the Plaintiff, and, if necessary, punish the Defendants. These

instructions were issued immediately following the objectionable arguments. In the view of this Court, therefore, Defendants were not prejudiced by the statements.

Defendant's next three arguments are based on the amount of the verdict. Defendant argues that the amount of the verdict shocks the judicial conscience, reflects passion, prejudice, undue sympathy and prejudice, and that remittitur is appropriate. This Court considers the jury's verdict of $115,000.00 in compensatory damages and $80,000.00 in punitive damages to be at the outer limits of an acceptable verdict in such a case. The verdict does not, however, shock the judicial conscience nor does it indicate that the jury was operating improperly. This Court does not find that remittitur is appropriate.

Defendants attack the basis of the jury's verdict in three arguments designed to show that the Plaintiff failed to produce sufficient evidence to support the jury's findings of liability. The first of these arguments is that the Plaintiff failed to establish a custom of inadequate policies and procedures for training, discipline and supervision which proximately resulted in the Plaintiff's injury. Defendants also contend that Plaintiff failed to establish a claim of excessive force against Defendant Monte Chastain, and that this Court erred in its refusal to direct a verdict in favor of Defendant Chastain on the claim that he did not intervene to stop Robbie Bishop from using excessive force against the Plaintiff.

As to Defendant's first argument, this Court considers the evidence and testimony produced at trial sufficient to have created a jury issue as to whether municipal

liability existed. Plaintiff's expert testified as to his opinion that the procedures and management style of the Sheriff Hansird were inadequate and this testimony was accepted by the jury. Defendants' arguments as to the liability of Defendant Chastain are similarly defective in that they ignore the jury's responsibility to judge the credibility of witnesses.

Defendants next argue that this Court erred in admitting the deposition testimony of Johnnie Jones Allison. Defendants contend that the Plaintiffs failed to make an adequate showing of due diligence in attempting to obtain her appearance. This was a problem known by all sides in their preparation for trial, and a problem dealt with at trial to the best of this Court's ability. In the view of this Court, Plaintiff did make an adequate showing of due diligence. Moreover, Defendants were not prejudiced by the deposition testimony since they were afforded an adequate opportunity for cross examination.

Defendants' final two arguments are aimed at the Court's decision not to bifurcate the trial of this case and the Court's charge to the jury. Defendants contend that the Court's decision not to bifurcate the trial resulted in a confusing charge on liability which misled the jury. Defendants also contend that the Court's refusal to present certain of Defendants charge requests prevented the jury from considering whether the officers' actions were justified. In the view of this Court, however, the charge to the jury given in this case was appropriate.

Plaintiff's Motion for Attorney's Fees and Costs presents a number of hotly contested issues. It appears that a

conference is required in order to adequately resolve them.

Accordingly, based on the above, Defendant's Motions are DENIED, and a decision on Plaintiff's Motion for Attorney's Fees and Costs is reserved. A hearing on Plaintiff's motion will be set by the Court in the near future by separate order.

IT IS SO ORDERED, this the 27th day of May 1992.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

JOHNNY VINEYARD

JUDGMENT IN A CIVIL CASE

V.

(Filed Jan. 29, 1992)

MURRAY COUNTY, GEORGIA, BILL HANSIRD, in his official capacity as former Sheriff of Murray County, MONTE CHASTAIN and ROBERT BISHOP

CASE NUMBER: 4:89-cv-149-HLM

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Johnny Vineyard, recover of the Defendants, Murray County, Georgia, Bill Hansird, in his official capacity as former Sheriff of Murray County, Monte Chastain and Robert Bishop, the sum of ONE HUNDRED AND FIFTEEN THOUSAND DOLLARS ($115,000.00) compensatory damages and recover of the Defendant, Robert Bishop, the sum of SIXTY THOUSAND DOLLARS ($60,000.00) punitive damages and recover of the Defendant, Monte Chastain, the sum of TWENTY THOUSAND DOLLARS ($20,000.00) punitive damages, with interest as

to all defendants at the rate as provided by law, and his costs of action.

January 29, 1992	LUTHER D. THOMAS
Date	*Clerk*
	/s/ Thom Stewart
	(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Johnny Vineyard

Plaintiff,

v.

CIVIL ACTION
4:-89-cv-149-HLM

County of Murray, Georgia,
Bill Hansird, Monte Chastain
and Robert Bishop,

Defendants.

ORDER

(Filed Sep. 19, 1991)

This case is before the Court on motions for summary judgment filed by Bill Hansird, Murray County, and Monte Chastain, as well as the Defendant's Motion to Strike the Affidavit of James D. White. Plaintiff has also filed a Motion to Allow Plaintiff and to Require Defendant to File Additional Materials for Consideration in Defendant's Motions for Summary Judgment.

The case arises out of the alleged beating of Johnny Vineyard by officers of the Murray County police department. The officers, Robert Bishop and Monte Chastain, Defendants herein, were ordered to proceed to the home of Debra Vineyard during the early morning hours of July 29, 1988. The police were responding to Ms. Vineyard's request for help in ending a domestic dispute between her and her former husband, Johnny Vineyard.

At that time Debra and Johnny Vineyard were undergoing a divorce proceeding and arguing about their marital situation. Apparently Johnny had reached the premises of Debra's home in the early morning hours and in an intoxicated and aggressive state. By the time the officers arrived, Mr. Vineyard had severely cut his hand in an attempt to enter the house through a window, and had been beaten by a crutch wielded by Martha Campbell, a friend of Debra's. When the officers arrived Mr. Vineyard had been repulsed as far as the doorway of Ms. Vineyard's home or its vicinity. The officers noted blood "all over the place." Bishop Deposition, at 24-25.

Johnny Vineyard was arrested for disturbing the peace and taken to the Murray County Hospital for treatment of his lacerated hand. Upon reaching the emergency room, Mr. Vineyard admits, he was loud, boisterous, and disorderly, as the medical personnel attempted to treat him. Mr. Vineyard denies telling the staff that he had consumed a full bottle of medication. Nonetheless, when Mr. Vineyard refused to voluntarily induce vomiting, a decision was made to pump Mr. Vineyard's stomach. Mr. Vineyard alleges that during the course of these events he was severely beaten by Officers Monte Chastain, and Robert Bishop. Both officers deny beating Mr. Vineyard.

Defendant's have filed two motions for summary judgement. The first was filed by Defendant Monte Chastain and is based on his contention that Plaintiff did not provide enough evidence in his deposition testimony to create a genuine issue of material fact as to whether Officer Chastain participated in or facilitated the alleged beating. The second motion was filed by former Sheriff Bill Hansird and Murray County. They allege that no

genuine issues of material fact exist as to whether the constitutional deprivations alleged in this case resulted from a municipal "policy or custom." Both of these motions will be discussed in turn.

I. Motion to Strike Affidavit

The Court will first, however, address Defendant's Motion to Strike the Affidavit of James White. Mr. White has filed an affidavit in support of the Plaintiff's response to Defendant's Motion for Summary Judgment. In his affidavit Mr. White lays out his opinion that the policy makers charged with responsibility for the Murray County Police Department failed to adequately train, supervise and discipline the members of the County Police force, and that this failure made the beating alleged by the Plaintiff inevitable.

Defendant contends that the affidavit should not be considered by the Court since it contains inadmissable [sic] evidence, is presented without the requisite foundation, and because it is not based on the personal knowledge of the affiant.

Having noted Defendant's objections, this Court must nonetheless allow the submission of Mr. White's affidavit. As Mr. White's curriculum vitae makes clear, he falls within the definition of an expert set forth in Federal Rule of Evidence 702. Mr. White has been tendered and received by this Court as an expert on police practices in the past. Mr. White's affidavit in this case also meets the

requirements of Federal Rule of Civil Procedure 56 (e).[1] Mr. White states that his opinions are based on his review of all the testimony, and evidence of the case. He goes on to give his opinion of the police practices which are established by the record. While the Defendant's are correct that Mr. White's statements bear a strong similarity to the Plaintiff's legal conclusions, this Court is not entitled to discard Mr. White's affidavit on the ground that he is not competent to testify as to conclusions of law. Mr. White does not purport to testify as a legal expert, but expresses only his opinion as an expert in police practices. Accordingly, Defendant's Motion to Strike Mr. White's affidavit must be denied.

II. Defendants Bill Hansird and Murray County's Motion for Summary Judgment

The Defendant's motives in filing the above motion to strike are best understood in relation to this motion for summary judgment. By relying on Mr. White's affidavit Plaintiff is able to demonstrate the existence of a genuine issue of material fact as to whether or not the Defendants' alleged failure to train, supervise, investigate and discipline its officers constitute: (1) a municipal custom which was the driving force behind the alleged constitutional deprivation, and (2) a causal connection between the actions of the supervising official and the alleged constitutional deprivation. *See, Fundiller v. City of Cooper City,*

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[1] Federal Rule of Civil Procedure 56 (e) provides that an affidavit must (1) be made on personal knowledge; (2) show the affiant as competent to testify; and (3) must contain admissable [sic] evidence.

777 F.2d 1436 (11th Cir. 1985); *Brown v. Crawford*, 906 F.2d 667 (11th Cir. 1990); *Lewis v. Smith*, 855 F.2d 736 (11th Cir. 1988).

Under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), a municipality may be held liable under 42 U.S.C. 1983 if a "custom or policy" is the "moving force" behind a constitutional violation. *Id.* at 690-94. Section 1983 actions against municipalities or supervisors, however, must be based on something more than a respondeat superior theory. *H.C. by Hewitt v. Jarrard*, 786 F.2d 1080 (11th Cir. 1986). A municipality's failure to correct the constitutionally offensive actions of its police department only rises to the level of a "custom or policy" if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct. *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987). Likewise for supervisory liability to be established it must be shown that a supervisor's conduct or inaction amounted to a reckless or callous indifference to the constitutional rights of others, *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), and that a causal connection exists between these actions and the alleged constitutional deprivations. *Fundiller*, supra.

While this Court cannot say that Plaintiff is likely to prevail in any of these showings, the question on summary judgment is simply whether or not a genuine issue of material fact exists as to these showings. The affidavit of James White, submitted as an expert in police practices, states that the policies and practices of Murray County and the official responsible for those policies, Bill Hansird, evince a reckless disregard for the rights of citizens of Murray County and, in his opinion, would

lead inexorably to constitutional deprivations of the sort alleged by Plaintiff here. In the view of this Court, a genuine issue of material fact as to these showings exists, and precludes a grant of summary judgment. Defendant Bill Hansird and Murray County's Motion for Summary Judgment is therefore denied.

III. Defendant Monte Chastain's Motion for Summary Judgement

Plaintiff was deposed on February 15, 1990. During his deposition Plaintiff was asked his story as to what occurred on the night in question, and especially what occurred in the hospital emergency room. Defendant apparently considered Plaintiff's deposition testimony sufficiently equivocal on the issue of whether Defendant Monte Chastain participated in the alleged beating that Defendant filed a motion for summary judgment on that ground. Defendant argues that no genuine issue of material fact exists as to whether Defendant Chastain used excessive and unreasonable force such that Plaintiff was deprived of his rights secured by the 4th, 5th, 8th and 14th Amendments.[2]

This Court's review of the record however, leads only to the conclusion that a genuine issue of material fact on this issue is squarely presented. Plaintiff has alleged that he was the victim of a savage beating which left blood all over the walls of the hospital emergency room and his

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[2] Defendant's argument is that he did not hit Plaintiff, but even if he did, his use of force was justified under the circumstances.

jaw shattered. The beating alleged, if it occurred, is likely to go beyond a mere tort, to a violation of substantive due process rights. *See, Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973) *cert. denied* 414 U.S. 1033 (1973); *H.C. By Hewitt v. Jarrad,* supra . . .[3] Plaintiff's deposition testimony, rather than equivocating, places Defendant Chastain at the scene of the beating, and goes on to state that he participated in the beating.[4] This version of the facts is obviously contrary to that set forth by the Defendant and a genuine issue of material fact is therefore created. Defendant Chastain's motion for summary judgment must therefore be denied.[5]

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[3] In *H.C. by Hewitt,* the Eleventh Circuit adopted the 2d Circuit test for analyzing whether official use of force violates constitutional rights. According to this test in assessing the official use of force the Court must "look to: (1) the need for the application of force, (2) the relationship between the need and the amount of force that was used, (3) the extent of injury inflicted, and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.,* at 1085.

[4] Plaintiff testified on deposition as follows: "I felt my jaw popped, and then after that, he about knocked me out. I don't know – I couldn't remember nothing hardly after that. I do remember something – Chastain hitting me a couple of times."

[5] The Court has noted two other arguments presented by Defendant Chastain and will address them only briefly. First, the fact that Plaintiff did not testify as to exactly where or how he was struck by Defendant Chastain has no legal effect. The inference of Chastain's participation in the general (alleged) orgy of violence creates the requisite fact issue. Second, under the liberal interpretation of complaints mandated by the Federal Rules of Civil Procedure, Plaintiff's original complaint which specified Defendant Chastain's conduct and charged him with participation in the beating, could also fairly be construed as

IV. Plaintiff's Motion to Require Submission of Further Materials

Plaintiff has requested that the Court consider further materials in its resolution of the pending motions for summary judgment. These materials, which appear to be most, if not all, of the completed discovery in this case, are in no particular order, and unacompanianied [sic] by any legal argument as to why they should be considered or what they should indicate. Moreover these materials were submitted well outside of time limits which govern the instant motions.

This Court therefore denies Plaintiff's motion and has not considered the materials submitted in conjunction with the above decisions.

V. Conclusion

Accordingly, based on the above, Defendant's Motion to Strike is DENIED, Defendant Bill Hansird and Murray County's Motion for Summary Judgment is DENIED, Defendant Monte Chastain's Motion for Summary Judgment is DENIED and Plaintiff's Motion to Submit Further Materials is DENIED.

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alleging "failure to protect" were it found that Defendant Chastain merely facilitated the beating.

IT IS SO ORDERED, this the 19th day of September 1991.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOHNNY VINEYARD,

Plaintiff,
vs. 4:89-CV-149 HLM

COUNTY OF MURRAY, GEORGIA,
WILLIAM HANSIRD, ROBERT BISHOP
and MONTE CHASTAIN,

Defendants.

Transcript of proceedings in the above-styled cause reported before the Hon. Harold L. Murphy on January 9, 21, 23, 24 and 27, 1992.

APPEARANCES:

MR. GREGORY KINNAMON
and MR. JEFFREY DEAN,
on behalf of plaintiffs;

MR. J. ANDERSON DAVIS
and MR. RICHARD CROMARTIE,
on behalf of defendants.

Reported by:

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VOLUME I – January 9 and 21, 1992

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[p. 9] THE COURT: Well, it won't go to the jury on the negligence of the sheriff and the county from the standpoint of that terminology, unless –

MR. DEAN: The main thrust of the case against the sheriff and the county is the policy of deliberate indifference.

THE COURT: Well, I'll deny your motion to bifurcate the trial. I'll keep in mind your problem and if it develops that I think you can't get a fair trial for any of your parties during the course of the trial because of the Court's failure to bifurcate it, I'll grant a mistrial and we'll start over. I think the way the evidence comes in and the Court's ability to adequately instruct the jury will have a lot to do with whether or not a fair trial can be obtained. And it could be that the testimony of this expert in Florida may be of such character that it could cause the Court to grant a mistrial. I don't know how he's going to testify in this case.

MR. DAVIS: With respect to other matters, Your Honor, I do intend, Rick and I both are working on various aspects of motions in limine and one of the things that I wanted to bring to the Court's attention with respect to the expert is plaintiffs have supplemented the answers to interrogatories as to the expert, but their supplemental answer to the interrogatory has been very general, not as to specifics. [p. 10] You'll note their response is about two and a half pages long.

And then the expert did provide an affidavit which was the only basis, in reading the Court's Order, on denying the summary judgment that allowed plaintiff's claim to continue to a jury.

We would submit that anything other than what is contained in the answers to interrogatories and contained in the affidavit as far as any testimony from the expert

should be excluded for failure to comply with Rules of Federal Procedure 26.

I could not locate yesterday or this morning the Eighth Circuit case, but I'll remind the Court in *Pearson versus Southern Railway*, a case which was tried about four years ago before Your Honor, the Court limited an expert's testimony of an expert on behalf of the plaintiffs in that case based on the plaintiff's failure to completely comply with Federal Rules in setting forth all the grounds and so forth as to what, and the basis of the testimony as to the expert witness. Although the expert witness was allowed to testify, there were certain limits that the Court placed and I plan to put all of that in a written motion in limine and address it before that.

We have tentatively scheduled the plaintiff's expert's deposition for Friday prior to trial in his home town in [p. 11] Tallahassee. I'm inclined not to want to go to the expense and take away from the preparation of the case based on what this Court's previous rulings have been as to experts and as to what the limitations would be as I have mentioned in the *Pearson versus Southern Railway* case.

THE COURT: Well, I remember that incident now that you brought it up, and I don't know what you have got in this case, but if you recall, and I say this for the benefit of everybody, it was a very, very apparent failure to disclose what the expert, all that the expert or anything much that the expert was going to testify about except a very narrow issue.

MR. DAVIS: Well, in this case the plaintiffs have set forth very broad and general grounds and as to

some specifics, I think the affidavit probably gets into the specifics more.

THE COURT: Well, it may be when you take his deposition that you have fleshed out what your situation is better, but certainly if you want to file a motion, I'll hear it.

MR. DAVIS: There are some other aspects which I – just general matters which I would file in a motion in limine; obviously, to exclude any claims or any mention of any insurance, which I don't anticipate plaintiff's counsel would do.

[p. 12] THE COURT: I would grant those for you.

MR. DAVIS: As to any offer of compromise or any Rule 68 offer of judgment that may have been discussed between the parties; any personal belief or any opinion that the plaintiff's attorney or any attorney may have as to the claim or the cause of action as to what might give rise to testifying to that. And then any contingency basis that they may have. And then also any comparisons to any other claims, or cases, or injuries, or verdicts with the exception that if –

THE COURT: This is going to be your motion in limine? You're not making it now?

MR. DAVIS: No, sir. I'm bringing all of those to let the plaintiff know.

THE COURT: You were so enthusiastic.

MR. DAVIS: With the exception on comparison to other claims, plaintiff is able to get into evidence

verdicts in favor of the plaintiffs in the wagon train cases, as they came to be known, I intend to, at least, make a proffer as to what the verdict was, especially against Robbie Bishop.

THE COURT: Well, if the Court has a mental aberration and lets in the amounts of verdicts, I would think it would have another mental aberration to let you put them in also. But I don't anticipate that either of you will get to put them in.

[p. 13] MR. DEAN: We don't intend to put any of that information in, Your Honor.

MR. DAVIS: I tried to get through the pretrial, Your Honor, to make sure we have addressed all the things we wanted the conference on. I think the main purpose for the conference was the bifurcation.

THE COURT: I thought that probably was. What is this professor's name from Tallahassee?

MR. DEAN: James White.

THE COURT: James White, Professor James D. White. I had forgotten.

MR. DEAN: He's a professor at FSU.

MR. DEAN: We have – I have changed firms, I have been the one handling this case for a long time.

THE COURT: What firm are you in now?

MR. DEAN: I'm with Waycaster and Morris. Marcus Morris also has a case on this trial calendar. But I intend to amend the pretrial order for those type things.

THE COURT: All right. Okay.

MR. DEAN: Some general matters.

THE COURT: Well, is there anything else we need to do today would help expedite the case?

MR. DAVIS: I don't believe so. I understand that in talking to Jeff that Mr. Morris's case, he had one against Bartow County Sheriff's Department which Jeff Davis is [p. 14] defending and that case has been moved to the second week which would make our case second on the calendar.

THE COURT: Okay.

MR. DAVIS: For January 21st, which would be Tuesday, the day after Martin Luther King birthday celebration. I don't know the status of the first case. I assume it's ready.

THE COURT: Far as I know, we're having conference in it at three this afternoon. You all not going to settle this case?

MR. DAVIS: We have tried.

MR. DEAN: We have attempted to, Your Honor.

MR. DAVIS: If the Court has some comments along those lines, I would be interested in exploring those.

THE COURT: No, I don't have any comments, except that all of you ought to be aware of the strong, strong claims made in the wagon train case supported by Mr. Vineyard and the jury didn't buy any of them much.

MR. DEAN: Yes, we're aware of those, Your Honor.

THE COURT: And so, you know, whether they will accept Johnny Vineyard's position, another jury will or not, I don't know.

MR. DEAN: The jury didn't hear Mr. Vineyard's position in the wagon train case, that was one that was made on proffer of evidence.

[p. 15] THE COURT: That's right, I wouldn't let it in.

MR. DEAN: Yes, sir.

THE COURT: That's right. Yeah. Well, we'll welcome you with open arms to get your case tried.

MR. DEAN: That's all we have, Your Honor.

THE COURT: Okay.

January 21, 1992

(Jury voir dire is conducted; said voir dire was reported, but not transcribed herein pursuant to request of Appellee)

THE COURT: You gentlemen had some motions in limine?

MR. KINNAMON: Yes, Your Honor. As to the plaintiff's motions in limine, Your Honor, item one pertains to the plaintiff's conviction for burglary, I think it was in 1976 or 77, which is a felony, but it's over ten years old.

We would request that the Court exclude that from impeachment. According to Rule 609, Federal Rules of

Evidence, states that the, you know, felony conviction would be allowed to impeach the witness, however, it being over ten years old, we would argue that the prejudicial effect would outweigh any probative value.

Also, there is some other misdemeanor charges within the past ten years, Your Honor, certain things such as DUI's, drunk and disorderly, I think there was one pointing a gun at another, which was not a conviction, it was an arrest. These would fall within the 609(A)2, of which we do

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[p. 232] on any handwritten notes. Although I was not allowed to inspect or review those, I was under the impression based upon what Mr. White was saying that these were typewritten transcripts based on interviews that Mr. Dean had taken apparently by some tape recorded method.

And Mr. White carefully avoided that, saying he didn't rely on any particular handwritten notes.

MR. DEAN: I know a lot of them were handwritten and I don't remember whether – some of them may have been typed, but they were all witness interviews and I'll be glad to get him in here before the jury comes back in and allow Mr. Davis to ask him what he relied on.

THE COURT: No, we don't need to do that. When Mr. Davis gets him on examination, if he indicates that he relied on anything that has not been produced to Mr. Davis, I'll require that it be produced and that you get an opportunity to see it before you have to complete your cross examination.

MR. DAVIS: Thank you, Your Honor.

THE COURT: As to your motion in limine, I don't know how to practically handle the matter on a motion in limine such as you have filed here. The Court does not disagree with you at all that it is the law that an expert should not be generally allowed to testify to something that's negligence or not negligence.

[p. 233] The Court is aware of that rule. Whether or not the examination of this witness we're about to have is going to get into areas of ultimate fact that the Court

would exclude, I don't know until I hear the nature of his testimony and what is going to be asked of him. So I'll deny your motion in limine and we'll just handle it by your making objections when you think the expert's crossing the line into inadmissible areas.

MR. DAVIS: Yes, sir.

THE COURT: Is he going to be your next witness?

MR. DEAN: Yes, sir.

THE COURT: How long do you think this testimony will take?

MR. DEAN: We were trying to decide that earlier, Your Honor.

MR. KINNAMON: Our side will be about an hour.

THE COURT: We can go ahead and take a recess at the time when his direct is completed. But maybe we ought to take about a five minute break, five or ten minutes at this point. You have another matter?

MR. DEAN: Yes, sir, I had discussed the matters that we talked about earlier about the prior civil suit and not mentioning that to my expert and he informed me that part of his opinion was based on the fact that not only that Sheriff Hansird didn't do anything to change the discipline or the [p. 234] supervision or anything of the deputies at the time of the incident, but he said he wanted to defer that determination to the jury, and then after the jury came back with a determination, he still

didn't do anything in changing his supervision and training.

THE COURT: Well, if your expert is using that as a basis of his opinion, you may not get it in. I made it clear last week that the outcome of that lawsuit has nothing to do with this case.

MR. DEAN: Yes, sir.

THE COURT: And the opinion of an expert with reference to this case, when he relies on a case, of a jury's verdict after the events of this case is just – well, you go ahead and try.

MR. DEAN: Well, no, we don't want to mistry the case, Your Honor. I wanted to find out, so if he needs to reword his opinions he can do so without doing it in front of the presence of the jury. We don't want to try it again.

THE COURT: I don't know how to make it any clearer than I made it last week, really, and that I made it today, that what the jury did in the wagon train case has absolutely nothing to do with this case.

MR. DEAN: I'll instruct Mr. White not to get into that.

THE COURT: I'm talking about what the jury did.

[p. 235] MR. DEAN: I'll instruct him.

THE COURT: All right.

MR. DEAN: That's all we have, Your Honor.

THE COURT: Okay.

(Short recess was taken)

THE COURT: Okay, if you will bring the jury.

(Jury seated in jury box)

COURTROOM DEPUTY: Mr. White, if you will raise your right hand and be sworn.

(Witness sworn)

COURTROOM DEPUTY: If you will please be seated and state your full name for the record?

A. My name is James David White.

DIRECT EXAMINATION BY MR. DEAN:

Q. Mr. White, would you please state your address and occupation for the record?

A. Yes, sir. I live at 2001 West Randolph Circle down in Tallahassee, Florida, and I'm an Associate Professor of Criminology and Criminal Justice at the Florida State University in Tallahassee.

Q. Okay. And what does an Associate Professor of Criminology do at Florida State University?

A. Predominantly our assignment is in teaching, although we have to do teaching, research, and public service. I teach in the area of police operations and procedures, legal

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VOLUME IV - January 27, 1992

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[p. 499] (Jury seated in jury box)

THE COURT: All right. We're now ready for closing argument, ladies and gentlemen. Plaintiff has the right to open and conclude the argument. So the plaintiff will open and then the defendant, counsel for the defendants will speak, and then Mr. Dean will conclude; after which the Court will instruct you as to the case and then it will be submitted to you. Whenever you're ready.

[p. 500] MR. DEAN: If there is anything good or positive that came out of the horrible Rodney King beating that most of you witnessed on television, is that the issue of police brutality was brought to the forefront of the news across the country and it gave a lot of people the opportunity to realize that police brutality does occur.

MR. DAVIS: Excuse me, Your Honor, I'm going to object at this point.

THE COURT: I'll sustain your objection.

MR. DAVIS: That has nothing to do –

THE COURT: What happened in California, and even though he didn't mention it was California, that's where it happened, really doesn't have anything to do with this case. This case has to be tried upon the evidence in this case. So go ahead.

MR. DEAN: Well, there was no video tape in this case and you, the jury, have been given the task of listening to all the evidence that has come in in trying to decide the best you can what happened on the morning of July the 29th, 1988.

The first evidence that you heard was the testimony of Johnny Vineyard. Johnny told you how he had consumed several beers the afternoon and evening of the 28th and how he had gone to his wife's house and tried to talk her into getting back together with him. When Johnny arrived he put [p. 501] his hand through the glass door pane and entered Debra Vineyard's home. I think the evidence indicates that there was a physical scuffle that ensued after he entered the home. You heard testimony from Debra Vineyard Elrod, Johnny's ex-wife, who testified that during the scuffle she never hit Johnny in the face or she never hit Johnny at all. You also heard testimony from Martha Campbell, the girl that stayed with Debra at the time, and I believe you heard her testify that she hit Johnny one time with a crutch in the back. And there are some pictures that will go out with you in evidence and you'll see on those pictures where Johnny has identified the bruise on his lower back where he was hit with a crutch.

Martha and Debra both testified that during the scuffle, Johnny never was hit in the face. Neither of these women had any reason to lie for Johnny. His ex-wife is remarried and so is Johnny. Martha certainly didn't have any reason to help Johnny in this case.

Then there were various accounts of what happened after defendants Bishop and Chastain arrived at the scene, but Johnny, Debra and Floyd Huelett all told you how the deputies, and in particular, Deputy Bishop began to treat Johnny a little rough at the beginning and cursing him and throwing him into the patrol car.

Debra, Floyd Huelett and Martha also agreed that Johnny [p. 502] did not resist arrest.

Defendants Bishop and Chastain gave only slightly different versions of the arrest and their versions differ from each other as much as they did from the witnesses, the other witnesses.

Then the evidence showed that Johnny was taken to the hospital for a bleeding hand and Johnny told you how defendant Bishop continued to stress in the car, warning Johnny to shut up or he would pull the car off the side of the road.

Upon arrival at the hospital there was some discrepancy as to how Johnny got into the hospital from the patrol car, but most everyone agrees that Stephanie Hall showed the deputies to room number four in the emergency room and Johnny was placed in that room immediately and given a preliminary examination by both Dr. Harbin and Nurse Coffey or Barbara Morgan.

Stephanie Hall, the girl that escorted Johnny and the deputies to the room, testified that she got a good look at Johnny's face when he came in and there was nothing wrong with his face at that time.

Dr. Harbin told you that he examined Johnny and there was nothing wrong with his face when he came in. Further, Dr. Harbin made no mention in the hospital records of any problems with Johnny's face.

[p. 503] Nurse Coffey or Morgan also made no mention of any problems with Johnny's face in her initial notes on the reports, 4:44 a.m., and you'll have that report to take back with you.

Then everyone, even Johnny, told you how Johnny was generally uncooperative and did not want Dr. Harbin to stitch his hand. You heard about eight different witnesses as to the events occurring at the hospital. First, as to Dr. Tony Harbin, he told you how there was nothing wrong with Johnny's face when he came in, nothing wrong. He also said there was nothing wrong with Johnny's face when he left. But Tony told you that he was the only doctor on duty in the emergency room that morning, he also told you that he had to attend to Ms. Allison's neighbor, Wilma Hicks, in the trauma room for heart problems.

He also stated that there may have been other patients in the emergency room that morning.

Obviously, Johnny was not interested in getting Dr. Harbin's help that morning and I think it's pretty obvious that Dr. Harbin was not interested in helping Johnny after the initial contact.

Dr. Harbin described the pill taking incident by saying that Johnny screamed and said he had taken a whole bottle and attempted suicide. Johnny says he tried to explain to Deputy Bishop that he had only taken one pill, but the [p. 504] deputies wouldn't listen. This is not really a critical point in the case, but Dr. Harbin stated that he could have, he would have called the pharmacy had it been open to see how many pills were in the bottle before pumping Johnny's stomach. But if Johnny really told him he was trying to commit suicide and taken a lot of the pills, why would he wonder how many he took or how many were in the bottle? Why not just go ahead and pump his stomach? The more likely explanation is that

given by Johnny, that he did try to tell that he had taken one pill and told the deputies that he had only taken one pill and then trying to decide who to believe, the doctor thought about calling the pharmacy, but then when that wasn't possible, decided to believe the deputies and to pump Johnny's stomach.

You also recall Dr. Harbin stated that the results of the stomach pump didn't show any pill fragments.

Now, Tony Harbin also stated at some point after the pill bottle, pill episode, that he walked to the front desk area to get to a quieter place to think. This would have been about the same time that defendant Bishop was to have stated that if the hospital person would step outside, Johnny would drink the solution when they came back in.

Tony says he didn't see anything wrong with Johnny's face when he left, but he also didn't want to get too close to Johnny. He testified to that. And in thinking about his [p. 505] testimony, considering his position, I submit to you that he probably did know what was going on in the hospital or had a strong suspicion of what was going on, but didn't have the backbone to step in and stop the law enforcement officers from doing this, and then when the matter developed into a lawsuit, he felt his reputation on the line for this young doctor who was there in charge of the emergency room for it to get out that somebody had been beaten up there while he was in charge of it would look mighty bad on him.

Now, as far as Barbara Coffey or Morgan, she examined him when he came in, she stated that she does recall Johnny having a swollen lip at some point that morning,

between 4:44 and six o'clock a.m., but she stated that she thought that he had it when he came in. There is no mention about the swollen lip in her nurse's note. No mention of any in the doctor's notes.

She also stated she didn't think Johnny's jaw was broken in the emergency room by the deputies, but she was the only nurse on duty that night. She admitted that Officers Bishop and Chastain were left in the room with Johnny alone on several occasions. And she and Dr. Harbin primarily base their opinions on the fact that Johnny could still holler and yell after he was supposed to have had his jaw broken. But you heard Doctor William David Fox, an oralmaxillofacial surgeon doctor who specializes in treating [p. 506] things like broken jaws and facial problems told you that it could take as long as twenty-four to thirty-six hours for a broken jaw to swell, and that it would be perfectly normal for a person to continue to talk and yell with a broken jaw as Johnny had for many hours after the break.

Then you heard from Danny Hall, the EMT assisting in pumping Johnny's stomach. Danny testified that when he arrived, he asked what happened to Johnny's face, and that he was told by the deputies that Johnny's wife had hit him in the face with a brick. Well, that should tell you two things: One, Johnny's face must have looked like it had been hit with a brick. And two, that's the first time anybody has ever heard anything about a brick. So that should tell you that the deputies had already begun fabricating a story about what happened to him.

Further, Dr. Harbin and Nurse Morgan both testified that Johnny had calmed down considerably when the

EMT's arrived to pump his stomach. Well, of course he had calmed down a lot. He's just had the devil beat out of him. He was a lot more cooperative at that point.

Now, let's talk about the eye witness testimony. Ms. Allison. Everybody agreed that Ms. Allison was sitting out in the hall looking into Johnny's room. She told you how she sat in amazement in the hall at the Murray County Memorial Hospital while defendant Bishop brutally pounded on [p. 507] Johnny. Nurse Morgan, Stephanie Hall and Dr. Harbin all told you that the door was generally left open and they all agreed that Ms. Allison was sitting outside the room.

Ms. Allison told you in graphic detail how defendant Bishop had beaten Johnny in the face and the chest and that when defendant Bishop was asked to stop, that he threatened to beat the pacemaker out of Johnny's chest.

You'll note in pictures, some of the pictures that go out with you, that you'll be able to see the scar on Johnny's chest and the place where the pacemaker protrudes through the skin.

Ms. Allison also told you how defendant Bishop came out of the room several times, washed his hands, rolled up his sleeves and went back in for more. You can see also pictures of the hospital room that showed the sink right outside the door of the hospital room.

There were several witnesses, several of the witnesses that agreed that deputy Bishop was pulling Johnny's hair on several occasions, that may have been proper procedure, that may have been okay under the

circumstances, but defendant Bishop seemed to have forgotten whether or not he pulled Johnny's hair or not. Both Johnnie Allison and Stephanie Hall testified that it was obvious from his appearance that Johnny had been badly beaten when Ms. Allison left and when Johnny left the hospital.

[p. 508] Now, I ask you just to look at the facts. The defendants have tried to infer that because there was blood everywhere that Ms. Allison may have just misinterpreted what she saw. But you saw Nurse Morgan testify that there was some blood, which would have been normal to see some blood coming out of Johnny's nose after the stomach pump, but she didn't have any explanation for the streaming blood Ms. Allison talked about coming from Johnny's mouth and that would certainly be consistent with the compound fracture that the doctor's testified about that had poked through the skin on the inside of Johnny's mouth.

At nine o'clock when Johnny returned to the emergency room, Dr. Tamayo looked at his record, noted that Johnny had a swollen lip and chin, and later that night when Johnny arrived at Floyd Medical Center in Rome, his jaw was x-rayed and conclusively found to be broken, I think in several places; once about here in the center of the chin and once in the back.

The defendants raised the questions about why didn't he complain at nine o'clock and one o'clock. Well, as you know, he had consumed quite a lot of beer and had taken at least one Xanax tablet, and Dr. Fox also testified that one might go for days without realizing the jaw was broken.

Also remember that Johnny testified that a deputy remained in the room with him the whole time he was in the [p. 509] hospital, threatening Johnny if he told anyone what happened. So out of fear, Johnny testified that he kept his mouth shut.

Also, when he went back at one o'clock, there was no mention of any jaw problem, also no mention of swollen lip. That, of course, you know that had not gone away by one o'clock. The primary concern at one o'clock was the apparent suicide attempt.

But immediately, as the evidence showed you from the doctors' depositions taken here in Rome, that as soon as Johnny got away from the deputies, was left alone at the mental health facility, that he did begin to tell his story and his jaw was x-rayed and found to be broken.

Now, the defendants may try to indicate that his jaw could have possibly been broken in the jail cell. Well, they were the ones in charge of the jail, they knew who had been there and who had not. But there was no witnesses put up by the defense to come in and say yes, there was a fight that night or that morning in the jail cell. This is what happened.

But we did produce one witness, a Mr. Rex Evans, that was in the jail at the time Johnny was brought in and Rex told you about how bad Johnny looked when he came in, how he was holding his jaw when he came in and he doesn't remember any fights going on that day or for the whole three months [p. 510] that Mr. Evans was in jail.

Now, Rex didn't have anything to gain from testifying on Johnny's behalf either.

Now, you heard evidence of the arrest report. Obviously, Mr. Chastain testified that he did see an arrest report started. Sheriff Hansird told you it would have been really unusual not to find an arrest report. And there is not one, there is not one to be found in this case.

And Professor White also told you how it was standard operating procedure to always have an arrest or an incident report, and there just wasn't one.

When Ms. Allison called Sheriff Hansird on the phone on July the 29th and told him about the two deputies that were beating the man at the hospital, Sheriff Hansird didn't realize it was going to go this far. Nobody thought it was going to go this far.

They looked at Johnny and thought, there is an uneducated fellow, nobody is going to believe him, he's not going to say anything and if he does say anything, nobody is going to believe him over us. But they did, it did go further. You heard evidence of Professor White talk about how Sheriff Hansird has been in law enforcement since 1970 and sheriff since 1981, yet in 1988 he still didn't have a policies and procedures manual that was specifically made out for policies and procedures of the sheriff's [p. 511] department. He also testified as to the problems, which Sheriff Hansird in Murray County's manner of recording, refusing to report phone-in complaints and his methods of investigating those complaints and keeping a log for them, and testified as to the importance of that in being able to assess the needs, what kind of extra needs the deputies might have as far as training

or what other things he might have needed to do. But he had no idea how many complaints had been made because he just didn't keep a running record of it.

Professor White testified that Sheriff Hansird's terrible method of recording and investigating complaints and disciplining the officers actually incurs abuses and excessive force in establishing a well entrenched custom, that if you step over the line, probably no one is going to find out about it. If they do find out about it, I'm not going to do anything.

There was other evidence, because of time, I won't go into it, that Professor White went into about the inadequate policies and procedures of training or policies and procedures of supervision that defendant Hansird gave and Professor White finally concluded in saying that in his opinion, that the problems and the beating that's alleged by Johnny Vineyard would never have occurred had the proper procedures been in place.

[p. 512] I'll go through the damages now, real quick. One of the exhibits that you'll get is the medical expenses. If you take all of the bills that you have and total them up – And there is also, you heard Dr. Fox testify that his bill was approximately $1850, there won't be one of those in there, but if you total all of those bills, pharmacy bill, the total comes to $14,432.30.

The Judge is going to charge you that an element of plaintiff's damages is pain and suffering. I have gone through on the pain and suffering. On the pain and suffering, this is left to your enlightened consciences, which basically means that the figures that you come up with, if any, are up to you. We have assigned, gone

through and assigned what we thought were fair values as far as the infliction of a broken jaw on the 29th. We have estimated that that is probably worth at least twenty-five thousand dollars to have your jaw broken in the manner that Johnny did in the hospital.

The surgery, all the pain and suffering that Johnny went through with the surgery, probably worse, about another fifteen thousand dollars. The having your jaw wired shut for six weeks and all the problems that goes along with that, we figure that is worth at least ten thousand dollars. To have to put up with having your mouth wired shut for that long, for the six months thereafter, he [p. 513] testified he had to eat food from a blender, and all the pain that went along with that, we have estimated another ten thousand dollars.

The pain that he suffered until December, 1991 when he had his second surgery, that's about three and a half years worth of pain in his jaw, we estimated that to be twenty thousand dollars. We think that's more than a reasonable figure for putting up with jaw pain for three and a half years.

The surgery and all of the decisions that were involved in that with Dr. Fox in December, we estimated that would be worth at least five thousand dollars.

The recovery from surgery, couple of months there where Johnny has taken pain medication and that kind of thing, we estimate that at two thousand dollars. which brings a total of eighty-seven thousand dollars for the pain and suffering.

The compensatory damages total, if you total the medical expenses and the pain and suffering, comes up to $101,432.30.

Then the Judge is going to charge you on punitive damages. We have estimated what we think is a fair amount for the punitive damages and I'm going to tell you why. We have estimated two hundred and fifty thousand dollars against defendant Bishop, and if you believe defendant [p. 514] Chastain was involved in the beating, then we think a fair amount there is another two hundred and fifty thousand dollars. If you think that he just watched it and didn't stop it, may not consider that quite as bad, so we'd ask you for a hundred thousand dollars in punitive damages for that.

The reason these punitive damages are so important is because the punitive damages send a message back to everybody in Murray County. They send a message to the politicians there, the sheriff that's in office there, and the deputies that are involved there. You, by your verdict today, if you find that Johnny was beaten by the deputies, you'll send a message back to them. If you return a low verdict with low or no punitive damages, you'll tell them that you have given them your approval for this kind of behavior and that it's okay to occasionally beat a fellow up like this.

If you return a large verdict and tell the sheriff it's time to get some of those policies and procedures in effect so this won't happen again, tell the deputies think twice before you get into this kind of situation and use excessive force on a fellow. You'll tell the politicians there.

MR. DAVIS: Your Honor, I object at this point and ask to approach the bench.

THE COURT: All right.

[p. 515] (Outside the jury's hearing)

MR. DAVIS: We talked about sending a message and a message to the particular defendants. Mr. Dean is now exceeding that in talking about sending a message to politicians. Politicians are not a party to this case and which it's contrary to what the Court approved and we'd talked about in the motion in limine, and for that ground and for the previous ground, incident of Rodney King, we move the Court for a mistrial.

THE COURT: I'll overrule your motion. I'll briefly instruct the jury and then let you finish.

(Within the jury's hearing)

THE COURT: Ladies and gentlemen, let me interrupt just a moment to point out to you that the purpose of a verdict is not really to send messages out generally to people. The purpose of a jury verdict, if it is awarding damages, is to compensate a plaintiff if he's entitled to an award of damages, and in some instances it may be appropriate to award punitive damages, if it is appropriate to award punitive damages, then that is done to punish a defendant or defendants, and that's the real purpose of damages, if it's appropriate to award them. So go ahead, Mr. Dean.

MR. DEAN: I think I'll stop, Your Honor.

THE COURT: All right. You wanted to address the [p. 516] jury?

MR. DAVIS: Yes, sir, may I?

* * *

[p. 578] MR. DAVIS: For the record, Your Honor, I would like to, because I did not have the opportunity during closing argument to perfect and to articulate in much more detail my motion which I made for mistrial at the bench, if I might.

THE COURT: I'll let you, but it's a little bit late to do it now.

MR. DAVIS: I understand, but the Court was pretty quick with the Court's denial. I want to make sure that the Court understood and I think the Court did understand what my basis for the motion was.

THE COURT: Yes, go ahead, I think I did.

MR. DAVIS: Motion was number one, when the plaintiff started off in his closing argument to mention the Rodney King incident, an incident which was not in the case, I objected and the Court immediately instructed plaintiff's counsel not to go into that and instructed the jury. At that time I did not ask for a mistrial based on that thinking that the Court's instructions were appropriate and they would cover the situation. But then when counsel got into sending a message to politicians, a matter we had taken up in the defendant's motions in limine.

THE COURT: Let me ask, did you really want a mistrial, you really want a mistrial?

[p. 579] MR. DAVIS: I may, Your Honor. Yes, sir.

THE COURT: You know, let's be serious with the Court.

MR. DAVIS: Quite frankly.

THE COURT: See if the jury has had their coffee yet.

COURT SECURITY OFFICER DEAL: No, they haven't had it yet.

THE COURT: Go ahead with your motion then.

MR. DAVIS: Well, that was it. To send a message which we had covered, which we had covered in that.

THE COURT: Have you perfected your motion?

MR. DAVIS: I hope I have. But may I have a moment, Your Honor? In all candor with the Court, yes, sir.

THE COURT: You really want your motion for a mistrial?

MR. DAVIS: I'm concerned, yes, sir.

THE COURT: Mr. Davis, if I thought there was any legitimacy whatever in your motion, I would bring the jury in here and grant it. But the Court adequately instructed the jury. I'll deny your motion. If you will take these verdict forms to the jury and as soon as the other things are ready. We'll be at ease until the jury is ready. (Court is reconvened after a recess upon a note being received from the jury)

* * *

No. 93-648

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

COUNTY OF MURRAY, GEORGIA, BILL HANSIRD AS FORMER SHERIFF OF MURRAY COUNTY, MONTE CHASTAIN AND ROBERT BISHOP,

Petitioners,

against

JOHNNY VINEYARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Whether Petitioners received a fair trial when objections were sustained and curative instructions were given after counsel for Respondent made reference to the Rodney King video tape during closing argument and later argued to the jury that their verdict would send a message to the people and politicians of Defendant Murray County, Georgia.

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IV. STATEMENT OF THE CASE

This case involves alleged improper closing argument by Respondent where objections were sustained and curative instructions were given. Petitioners basically contend that certiorari should be granted in order to severely limit the discretion of all trial judges in giving curative instructions in lieu of granting a mistrial. The facts of this police brutality case involve the brutal beating of Plaintiff while he was handcuffed to a hospital bed, resulting in a severely broken jaw. Petitioners Chastain and Bishop physically abused Respondent despite their knowledge that Respondent had acute heart problems and a pacemaker. [*See generally*, App. pp. 3a-6a of Petition For Writ of Certiorari (Hereinafter "Petition")]. Defendant's Motion for Summary Judgment was denied. [App. pp. 31a-38a of Petition].

During closing arguments, Plaintiff's counsel made brief reference to the so-called Rodney King video tape by telling the jury that the video tape that they had seen on television brought the issue of police brutality to the forefront of news across the country, but that there was no video tape in this case, and that the jury had been given the task of listening to all of the evidence presented in this case and trying to decide the best they could what happened on the morning of July 29, 1988. [App. p. 54a of Petition]. Following a delayed objection by Defense counsel, the Court sustained the objection and gave curative instructions to the jury, as follows:

> What happened in California, even though he didn't mention California, that's where it happened, really doesn't have anything to do with

> this case. This case has to be tried upon the evidence in this case. So go ahead.

[App. p. 54 of Petition].

Closing argument then continued. Petitioners' counsel later objected to Respondent's closing argument when Respondent's counsel stated:

> The reason that punitive damages are so important is because the punitive damages send a message to everybody in Murray County. They send a message to the politicians there, the sheriff that is in office there, and the deputies that are involved there. You, by your verdict today, if you find that Johnny was beaten by the deputies, you'll send a message back to them. If you return a low verdict with low or no punitive damages, you'll tell them that you have given them your approval for this kind of behavior and that it's okay to occasionally beat a fellow up like this.
>
> If you return a large verdict and tell the sheriff it's time to get some of those policies and procedures in effect so this won't happen again, tell the deputies think twice before you get into this kind of situation and use excessive force on a fellow. You'll tell the politicians there.

[App. p. 66a of Petition]. At this point, Petitioners' counsel objected and moved for a mistrial, arguing that the cumulative effect of the "Rodney King" argument together with the "send a message" argument was prejudicial. [App. p. 67a of Petition].

The Court denied the motion for mistrial and again gave sufficient curative instructions, as follows:

> Ladies and Gentlemen, let me interrupt you just a moment to point out to you that the purpose of a verdict is not really to send messages out to people. The purpose of a jury verdict, if it is awarding damages, is to compensate a Plaintiff if he is entitled to an award of damages, and in some instances, it may be appropriate to award punitive damages, and if it is appropriate to award punitive damages, then that is done to punish a Defendant or Defendants, and that's the real purpose of the damages, if its appropriate to award them. So go ahead Mr. Dean.

[App. p. 67a of Petition].

At the Pretrial Conference on January 9, 1992, Defendants had indicated they would file motions in limine concerning evidence or statements regarding other civil actions and other verdicts regarding police brutality involving these Defendants. [App. pp. 43a-44a]. During this conference, discussion was directed to reference to verdicts in other cases, more specifically the "Wagon Train Case", which involved one of the deputies involved in this action, as well as the sheriff and county herein. These pretrial discussions revolved solely around prohibition of Respondent's counsel in revealing this previous jury verdict to the jury in the case *sub judice*. [App. pp. 43a-44a of Petition].

During pretrial motions, Defendant's counsel stated:

> . . . to send a message to the law enforcement agencies or the sheriff's around the state or to the deputy sheriff's around the Northern District of Georgia or anywhere else other than the parties of this case would be totally inappropriate.

[App. p. 2a-3a].

The Court ruled by stating:

> [C]ounsel have indicated that their reference to sending any messages would be limited to a matter that would not be offensive to the rules of the Court, so I'll deny the motion in limine.

[App. p. 4a].

There were no other significant objections, motions, or rulings involved in this case.

V. REASONS FOR DENYING THE WRIT

A. Arguments by Respondent's counsel were not improper.

It is well established that counsel may properly argue and comment on self-evident facts and matters of common knowledge outside the record. *See*, 88 C.J.S. § 181(b). In *Harris v. Pacific Floor Mach. Mfg. Co.*, 856 F.2d 64 (8th Cir. 1988), that Court held that the reading of an article by Ann Landers to the jury during closing arguments in a negligence action was not improper. The Court stated that there was nothing improper in a civil case when attorneys cite widely recognized authorities during their closing argument. In the case at hand, all of the jurors had indicated during voir dire that they had viewed the Rodney King video tape. As is made clear by Petitioners throughout their brief, because of the publicity generated, the video tape itself had to be within the common knowledge of all jurors. Nothing said by Respondent's counsel about this highly publicized matter was improper. No evidence of the Rodney King beating was introduced. No reference was made to any other civil action. No new

information was given to the jury outside their own common knowledge. No violation of any pretrial ruling was made. No court ruling was disregarded.

It is also well recognized that when punitive damages are involved, "send a message" arguments are entirely proper. *See, Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). In *King v. Macri,* 993 F.2d 294 (2nd Cir. 1993). Appellants argued that the punitive damage awards were unduly enhanced as a result of prejudice stemming from the fact that the trial occurred soon after the state court trial of the police officers accused of beating Rodney King in Los Angeles. Counsel for the Plaintiff in that case argued in summation that a punitive damage award should be given so that Defendants would no longer think they were above the law and that because they have a badge and they have a uniform they could violate people's rights and that the punitive damage award would send the same message to others in a position to abuse their authority. The Eighth Circuit Court held that similar remarks are made in summations in most police misconduct trials and are entirely appropriate. The Court further held that the temporal proximity of this trial to the state court Rodney King verdict is not a basis for limiting the normal scope of advocacy. *Id.*

In the case *sub judice,* the Petitioners' motion in limine was to prevent Respondent from asking the jury to send a message to other unrelated law enforcement agencies and officers. Respondent's counsel agreed to limit its "send a message" argument to Murray County, which was done. [App. p. 66a of Petition]. There was no violation of any court ruling on this point and nothing was said that offended the rules of the Court.

B. Assuming arguendo, that the arguments of Respondent's counsel were improper, which Respondent denies, they were effectively cured, and did not provide grounds for mistrial.

Even if any of the comments made by Respondent's counsel were considered improper, curative instructions appropriately dealt with the situation. *See, U.S. v. North,* 910 F.2d 843, 847 (D.C. Cir. 1990); *Edwards v. City of Philadelphia,* 860 F.2d 568 (3rd Cir. 1988); *Joan W. v. City of Chicago,* 771 F.2d 1020 (7th Cir. 1985); *Spray-Right Serv. Corp. v. Monsanto,* 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

Under federal law, a trial judge is given considerable discretion to control the tone of counsel's arguments. Absent abuse of discretion, the decision of the trial court, which has had the opportunity to hear the offensive remarks within the context of the argument and to view their affect on the jury, should not be disturbed. *Allstate Ins. Co. v. James,* 845 F.2d 315, 316 (11th Cir. 1988). In *Allstate,* cited by Petitioners, it was held that failure of the trial judge to sustain an objection regarding closing remarks of insurer's counsel that suggested that the jury had the power to control the cost of insurance through a verdict for the insurer, and the refusal to provide limiting instructions after the inflammatory remarks constituted reversible error. In the case *sub judice,* however, the trial Judge did sustain Petitioners' objections, and proper curative instructions were given correcting any wrong that may have occurred. [App. pp. 54a, 67a of Petition]. Further, no objection was made to the curative instructions

when given and Petitioners' counsel himself acknowledged that curative instructions regarding reference to the Rodney King video tape were appropriate. [App. p. 68a of Petitioners' brief]. In affirming the District Court's denial of mistrial, the Eleventh Circuit properly considered "the entire argument, the context of the remarks, the objection raised, and the curative instruction to determine whether the remarks were 'such as to impair gravely the calm and dispassionate consideration of the case by the jury.' " *Allstate Ins. Co. v. James*, 845 F.2d 315, 318 (11th Cir. 1988) (*Spach v. Monarch Ins. Co. of Ohio*, 309 F.2d 949, 953 (5th Cir. 1962)). [App. pp. 14a-15a of Petition]. The Court below concluded that: "The District Judge had the opportunity to observe and control the tone of the argument and to determine its impact on the jury. The challenged arguments were not clearly violative of the Pretrial Order, and the Court gave curative instructions to avoid any prejudice that might otherwise have resulted from the argument." [App. p. 17a of Petition]. As recognized by the court below, the trial court should have the opportunity to rectify errors while it is possible to do so without ordering a new trial. *Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1229 (7th Cir. 1984). Discretionary latitude must remain with the trial courts.

Courts are particularly reluctant to set aside jury verdicts because of argument made by counsel during closing arguments because harm from those arguments may be cured not only by curative instructions, but also by the Court's general charges to the jury that the attorney's arguments are not evidence. *See, Allstate*, 845 F.2d at 318; *Dickson v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Raucci v. Town of Rotterdam*, 902 F.2d 1050

(2nd Cir. 1990); *Royal Ins. Co. of America v. United Parcel Service, Inc.*, 147 F.R.D. 15 (E.D.N.Y. 1992); *Davis v. Wal-Mart Stores, Inc.*, 967 F.2d 1563 (11th Cir. 1992).

In *Solorio v. Atchison* T&SF R. Co., 224 F.2d 544 (9th Cir. 1955), Defense counsel for the railroad made extremely inflammatory remarks during his closing argument and stated that the only reason the railroad was being sued was because it was a "deep pocket". Plaintiff's counsel objected and the judge instructed the jury not to consider this remark. The Appeals Court held that this argument was not abusive and inflammatory and did not appeal to the sympathy, passion, racial, religious, social, class or business prejudice, and did not constitute reversible error due to the Judge's curative instruction.

In the case *sub judice*, there were only two isolated instances complained of by Petitioners in the motion for mistrial. Both instances, which were during closing argument, were objected to by counsel and the trial judge promptly issued sufficient curative instructions. Therefore, the Trial Judge did not abuse his discretion in denying Petitioner's motion for mistrial and the court below did not err when it upheld the District Court's award. Petitioners did receive a fair trial and were not unduly prejudiced by any remarks of Respondent's counsel.

C. The Eleventh Circuit ruling below is clearly consistent with previous rulings.

The Petitioners incorrectly state that the Eleventh Circuit's ruling in this case is inconsistent with *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990). In

McWhorter, the trial judge focused on an improper argument which contained a theory eliminated at Pretrial. Despite the lack of an objection, the Trial Judge granted a new trial. The Eleventh Circuit stated that they could not say that the District Judge abused his discretion in determining that the interest of substantial justice mandated a new trial. The Court went on to state that they recognized that curative instructions do not always eradicate the prejudice resulting from an improper argument and that is a matter left largely to the discretion of the trial judge in determining whether its instructions were sufficient to erase the prejudice resulting from the argument. *McWhorter* is entirely consistent with the Eleventh Circuit's opinion in the case at hand. Both cases adhere to the principle that the trial judge is given considerable discretion in controlling the tone and substance of counsel's argument. Due to the fact that the trial judge has the best opportunity to hear the remarks in their context and view the effect on the jury, the trial judge's ruling should not be disturbed absent an abuse of this discretion. Furthermore, this same basic principle regarding the discretion of the trial judge is applied uniformly throughout the United States, including those cases to which Petitioners have referred as supportive of their misplaced position that the Eleventh Circuit decision conflicts with other circuits and state courts. A careful analysis of those cases reveals that no such conflict exists.

The Petition for a Writ of Certiorari itself sets out to do exactly what Petitioners accuse Respondent of trying to do at trial: inflame the audience with passion and confusion and to prevent a decision based upon the

merits of the case.[1] Petitioners' brief also requests guidance from this Court to "address notorious emotional events and their impact on the fairness of a trial." In essence, Petitioners request that this Court define "notorious emotional events" for use in all trials, and that this Court create a hard and fast ruling that whenever these "notorious emotional events" are referenced in closing argument, that a mistrial would be the unavoidable result.

Petitioners would have this Court strip trial courts across the country of their discretion in determining the sufficiency of curative instructions as opposed to requiring a new trial. Any such ruling would only confuse the current standard regarding judicial discretion and would ignore the competency of the trial judge to control the tone and manner of the trial based upon his own observations and experiences. As a result of any such "guidance," the judicial system would be crippled by a

---

[1] Petitioners devote a considerable amount of attention in their brief to the riots and related destruction caused as a proximate result of the Rodney King video tape and to various other publications and articles concerning the subject. However, the citations only tend to underscore the fact that these issues were within the common knowledge of the jurors and any references by Respondent's counsel necessarily would have had very little, if any, impact on those jurors. Petitioners' counsel also makes reference to the fact that Respondent had petitioned for approximately $130,000.00 attorneys fees and expenses, while agreeing to accept a much lessor amount. Petitioners omitted from this immaterial reference that Respondents' petition included a request for a 100% fee enhancement. In fact, Petitioners' counsel agreed to pay Respondent's counsel $57,500.00 in attorneys fees and expenses, which is almost the entire amount requested, less the enhancement.

multitude of cases being unnecessarily retried. Further, such a rule would stifle competent counsel from referring to matters which are within the common knowledge of the jurors. Therefore, the ruling espoused in this case by the Eleventh Circuit is not only consistent with other jurisdictions and with other Eleventh Circuit court cases, but it is in keeping with common sense. Petitioners do not suggest any different rule that could be fashioned to apply to the facts of this case while providing useful guidance for others.

VI. CONCLUSION

Based upon the above-stated authorities, Petitioners have failed to show sufficient grounds for the grant of a Writ of Certiorari. The rulings in question by the trial judge and the court below were correct. Arguments by Respondent were not improper. Even if considered to be improper, the statements in question were properly and adequately cured by the District Judge. Further, the rulings of the Eleventh Circuit Court of Appeals were entirely consistent with previous Eleventh Circuit rulings and with the reasoning applied throughout all circuits. The issues involved in this case are extremely fact sensitive and were dealt with appropriately by the trial judge, based upon his own observations and experiences. No conflicts exist between the decision of the court below and other United States Court of Appeals. No decision has been made deciding this case in any manner that conflicts with the decision of any other State Court of last resort or United States Court of Appeals. No important question

of federal law is involved. Therefore, Petitioners request for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

VOLUME I – January 9 and 21, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOHNNY VINEYARD.

Plaintiff,

vs. 4:89-CV-149 HLM

COUNTY OF MURRAY, GEORGIA,
WILLIAM HANSIRD, ROBERT BISHOP
and MONTE CHASTAIN,

Defendants.

Transcript of proceedings in the above-styled cause reported before the Hon. Harold L. Murphy on January 9, 21, 23, 24, 27, and 28, 1992.

APPEARANCES:

MR. GREGORY KINNAMON
and MR. JEFFREY DEAN,
on behalf of plaintiffs;

MR. J. ANDERSON DAVIS
and MR. RICHARD CROMARTIE,
on behalf of defendants.

Reported by:

Martha J. Frutchey
U.S. District Reporter
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[p. 20] to hide behind the fact he was on a nerve prescription, I plan to get into that quite extensively and I think the Court would allow me to do that.

He indicated in his deposition, although he was on that medication, he didn't have any problem remembering the events or certain portions of the events, at least, and if he claims now that he was hindered during that deposition, obviously I'll be quite surprised and shocked.

THE COURT: Okay. All right. You had a motion, you had responded to his. You responded as you wanted to his?

MR. DAVIS: Yes, sir.

MR. DAVIS: I think we have agreed as to defendant's motion in limine as to –

MR. KINNAMON: 1,2,3 and 5. We have no problem with.

THE COURT: All right.

MR. DAVIS: There were some of the matters that I raised at the pretrial conference.

THE COURT: All right. You want to speak to the balance of them then?

MR. DAVIS: As to number 4, Your Honor, the send a message argument, I have set that out as prohibiting counsel for plaintiff making an argument to the jury at the close of the evidence or at any time to send a message in order to [p. 21] deter or punish other than those that are parties in this case to send a message to the law enforcement agencies or to the sheriffs around the

state or to the deputy sheriffs around the Northern District of Georgia or anywhere else other than the parties of this case would be totally inappropriate.

If there is going to be some argument of punishment under the exemplary damages, which may be permissible should the evidence allow it, I think it would only be as to the parties involved in the case and not to someone else.

As to number 6, just a general limine in having counsel, wherein we have gone through a discovery process and having counsel approach us and say where are those documents, you know, there are various ways in which they could have gotten documents. We have provided a number of documents, but to give any kind of impression to the jury we have now tried to hide any documents or anything like that is what I'm trying to prohibit there or to limit.

THE COURT: All right. How about the next one.

MR. DAVIS: Number 7 has to do with the expert witness which the plaintiffs plan to call as a police practices expert. We took Mr. White's deposition in Tallahassee, Florida. Mr. White, in his deposition, admitted that he would not testify as to who was telling the truth or who wasn't telling the truth and we're trying to prohibit him

* * *

[p. 27] deny your motion in limine on it. I can handle it with an objection if it's inadmissible.

I believe number 8 is no problem. He's not going to attempt to bring out the fact that a couple of other firms may have been contacted prior to getting present counsel.

The fact he was on medication, I'll not grant the motion in limine. Doesn't have any relevance unless it's made relevant, but I'll not grant a motion in limine on it.

On the defendant's motions in limine, counsel have indicated that their reference as to sending any messages would be limited to a matter which would not, and in a manner that would not be offensive to the rules of the Court, so I'll deny the motion in limine.

I'll deny your motion in limine with reference to number 6. The Court doesn't see the need to grant that. I would expect counsel, if they want any documents or want to make any demand for documents that are in the possession of counsel, that they do it like they're supposed to, privately ask counsel for them. If they don't privately ask counsel for them, then the Court has the ability to handle it.

I'll deny your motion in limine with reference to doctor – well, to Mr. White or Dr. White? I don't know how he's going to be questioned. And the Court can handle the problem with objections, if any evidence is objectionable.

I'll instruct counsel for the plaintiff not to talk

* * *